(14)

No. 01-705-CFX

Title: Jo Anne B. Barnhart, Commissioner of Social Security, Petitioner
v.
Peabody Coal Company, et al.
and
Jo Anne B. Barnhart, Commissioner of Social Security, Petitioner
v.
Bellaire Corporation, et al.

Docketed:
November 19, 2001

Vide:
01-715

Court: United States Court of Appeals for the Sixth Circuit

Entry	Date	Proceedings and Orders
	Sep 7 2001	Application (01A229) to extend the time to file a petition for a writ of certiorari from September 19, 2001 to October 19, 2001, submitted to Justice Stevens.
	Sep 7 2001	Application (01A230) to extend the time to file a petition for a writ of certiorari from September 20, 2001 to October 20, 2001, submitted to Justice Stevens.
	Sep 12 2001	Application (01A229) granted by Justice Stevens extending the time to file until October 19, 2001.
	Sep 12 2001	Application (01A230) granted by Justice Stevens extending the time to file until October 20, 2001.
	Oct 9 2001	Application (01A229) to extend further the time to file a petition for a writ of certiorari from October 19, 2001 to November 18, 2001, submitted to Justice Stevens.
	Oct 9 2001	Application (01A230) to extend further the time to file a petition for a writ of certiorari from October 20, 2001 to November 19, 2001, submitted to Justice Stevens.
	Oct 10 2001	Application (01A229) granted by Justice Stevens extending the time to file until November 18, 2001.
	Oct 10 2001	Application (01A230) granted by Justice Stevens extending the time to file until November 19, 2001.
	Nov 19 2001	Petition for writ of certiorari filed. (Response due December 19, 2001)
	Dec 19 2001	Brief of respondents Peabody Coal Company, et al. in opposition filed.
	Dec 19 2001	Brief of respondent Bellaire Corporation, et al. in opposition filed. VIDED.
	Jan 2 2002	DISTRIBUTED for Conference of January 18, 2002
	Jan 9 2002	Reply brief of petitioner Jo Anne B. Barnhart, Commissioner of Social Security filed. VIDED.
	Jan 22 2002	Petition GRANTED. The case is consolidated with No. 01-715 and a total of one hour is allotted for oral argument. SET FOR ARGUMENT October 8, 2002. **********
	Mar 1 2002	Order extending time to file the joint appendix and petitioner's brief on the merits to and including April 8, 2002.
	Apr 8 2002	Joint appendix filed. VIDED.
	Apr 8 2002	Brief of petitioner Jo Anne B. Barnhart, Commissioner of Social Security filed. VIDED.

2 pp

No. 01-705-CFX

Entry	Date	Proceedings and Orders
	Apr 8 2002	LODGING consisting of twenty copies of GAO Analysis of Proposal to Ensure Solvency of Combined Fund submitted by the Solicitor General. VIDED.
	Apr 8 2002	Brief of petitioners Trustees of the UMWA Combined Benefit Fund filed. VIDED.
	May 3 2002	Order extending time to file respondents' briefs on the merits to and including June 7, 2002.
	Jun 7 2002	Brief amicus curiae of Elgin National Industries, Inc. filed. VIDED.
	Jun 7 2002	Brief of respondents Peabody Coal Company, et al. filed. VIDED.
	Jun 7 2002	Brief of respondents Bellaire Corporation, et al. filed. VIDED.
	Jun 18 2002	Motion of the Solicitor General for divided argument filed.
	Jun 20 2002	Motion of respondents Bellaire Corporation, et al., for divided argument filed.
	Jun 28 2002	Motion of the Solicitor General for divided argument GRANTED.
	Jun 28 2002	Motion of respondents Bellaire Corporation, et al., for divided argument GRANTED.
	Jun 28 2002	Application (02A13) for an extension of time to file petitioners' reply briefs on the merits, submitted to Justice Stevens.
	Jul 2 2002	Application (02A13) granted by Justice Stevens extending the time to file until July 22, 2002.
	Jul 22 2002	Reply brief of petitioner Trustees of the UMWA Combined Benefit Fund filed. VIDED.
	Jul 22 2002	Reply brief of petitioner Jo Anne B. Barnhart, Commissioner of Social Security filed. VIDED.
	Jul 23 2002	CIRCULATED.
	Aug 8 2002	Letter from the Solicitor General received and distributed.
	Aug 15 2002	Record filed.
	Aug 20 2002	Record filed.
	Oct '3 2002	Supplemental brief of petitioners Trustees of the UMWA Combined Benefit Fund filed. VIDED.
	Oct 8 2002	ARGUED.

Supreme Court, U.S.
FILED
01 705 NOV 19 2001
OFFICE OF THE CLERK

No.

In the Supreme Court of the United States

JO ANNE B. BARNHART, COMMISSIONER OF SOCIAL SECURITY, PETITIONER

v.

PEABODY COAL COMPANY AND EASTERN ASSOCIATED COAL COMPANY

JO ANNE B. BARNHART, COMMISSIONER OF SOCIAL SECURITY, PETITIONER

v.

BELLAIRE CORPORATION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

THEODORE B. OLSON
Solicitor General
Counsel of Record
ROBERT D. MCCALLUM, JR.
Assistant Attorney General
EDWIN S. KNEEDLER
Deputy Solicitor General
PAUL R.Q. WOLFSON
Assistant to the Solicitor General
WILLIAM KANTER
JEFFREY CLAIR
Attorneys
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

QUESTION PRESENTED

The Coal Industry Retiree Health Benefit Act of 1992 (Coal Act or Act), 26 U.S.C. 9701-9722 (1994 & Supp. V 1999), established the United Mine Workers of America Combined Benefit Fund (Combined Fund) to ensure the continued provision of health-care benefits to retired coal miners and their dependents who worked under collective bargaining agreements that promised such benefits. Those benefits are financed principally through premiums that must be paid to the Combined Fund by "signatory operators" that employed miners under those collective bargaining agreements and are assigned responsibility for their retired miners' benefits. The Act provides that the Commissioner of Social Security "shall, before October 1, 1993," assign responsibility for each eligible retired coal miner to the signatory operator that employed the miner (or to a "related person" of the signatory operator). 26 U.S.C. 9706(a). The Commissioner was unable, however, to complete all such assignments before October 1, 1993.

The question presented is whether the Commissioner's assignments of responsibility for retired miners that were made on or after October 1, 1993, are void.

PARTIES TO THE PROCEEDINGS

In *Barnhart* v. *Peabody Coal Co.*, the petitioner is the Commissioner of Social Security. Respondents are Peabody Coal Company and Eastern Associated Coal Company.

In *Barnhart* v. *Bellaire Corp.*, the petitioner is the Commissioner of Social Security. Respondents are Bellaire Corporation, Nacco Industries, Inc., and North American Coal Corporation. Also named as respondents in *Bellaire* (but aligned below with the Commissioner) are the Trustees of the United Mine Workers of America Combined Benefit Fund: Michael H. Holland, William P. Hobgood, Marty D. Hudson, Thomas O.S. Rand, Elliot A. Segal, Carl E. Van Horn, and Gail R. Wilensky. We are informed that the Trustees will file a separate petition for a writ of certiorari.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	2
Statutory provisions involved	2
Statement	3
Reasons for granting the petition	15
Conclusion	29
Appendix A	1a
Appendix B	3a
Appendix C	5a
Appendix D	6a
Appendix E	7a
Appendix F	9a
Appendix G	12a
Appendix H	14a
Appendix I	26a
Appendix J	27a

TABLE OF AUTHORITIES

Cases:

Brock v. *Pierce County*, 476 U.S. 253 (1986)	16
Chevron U.S.A. Inc. v. *Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984)	11-12, 21
Dixie Fuel Co. v. *Commissioner of Soc. Sec.*, 171 F.3d 1052 (6th Cir. 1999)	10, 11, 12, 13, 20, 21, 22
Eastern Enters. v. *Apfel*, 524 US. 498 (1998)	4, 6
French v. *Edwards*, 80 U.S. (13 Wall.) 506 (1872)	16
Holland v. *Pardee Coal Co.*, No. 00-1770, 2001 WL 1244840 (4th Cir. Oct. 18, 2001)	15, 21-22, 23, 26
United States v. *James Daniel Good Real Prop.*, 510 U.S. 43 (1993)	16
United States v. *Mead Corp.*, 121 S. Ct. 2164 (2001)	21

Cases—Continued: Page

United States v. *Montalvo-Murillo*, 495 U.S. 711 (1990) 16
United States v. *Wells*, 519 U.S. 482 (1997) 17
University of Tex. v. *Camenisch*, 451 U.S. 390 (1981) 12

Statutes and rule:

Coal Industry Retiree Health Benefit Act of 1992, 26 U.S.C. 9701-9722 (1994 & Supp. V 1999) 3
26 U.S.C. 9701(b)(1) 5
26 U.S.C. 9701(c)(1) 4
26 U.S.C. 9701(c)(2) 19
26 U.S.C. 9701(c)(7) 5
26 U.S.C. 9702 4
26 U.S.C. 9702(a) 8
26 U.S.C. 9702(c) 8
26 U.S.C. 9703(b)(4) 8
26 U.S.C. 9703(f) 4
26 U.S.C. 9704 ..... 4, 17
26 U.S.C. 9704(a) 6
26 U.S.C. 9704(a)(3) 6
26 U.S.C. 9704(d) 6
26 U.S.C. 9704(f) 22
26 U.S.C. 9704(f)(1) 20
26 U.S.C. 9704(f)(2) 11
26 U.S.C. 9704(f)(2)(A) 21
26 U.S.C. 9704(f)(2)(B) 20
26 U.S.C. 9704(g)(1) 8
26 U.S.C. 9704(i)(1)(A) 8
26 U.S.C. 9705(a) 8
26 U.S.C. 9705(a)(1) 7
26 U.S.C. 9705(a)(3)(B) 7
26 U.S.C. 9705(b) 7
26 U.S.C. 9706 17
26 U.S.C. 9706(a) 2, 4, 5, 8, 14, 15, 18, 19, 22
26 U.S.C. 9706(a)(1) 5
26 U.S.C. 9706(a)(2) 5

Statutes and rule—Continued: Page

26 U.S.C. 9706(a)(3) 6
26 U.S.C. 9706(d) 6
26 U.S.C. 9706(e)(2) 6
26 U.S.C. 9706(f) 6, 13, 21
26 U.S.C. 9706(f)(1) 6
26 U.S.C. 9706(f)(2) 6
26 U.S.C. 9706(f)(3)(A) 7
26 U.S.C. 9706(f)(3)(B) 7
Consolidated Appropriations Act, 2000, Pub. L. No. 106-113, § 501, 113 Stat. 1501A-124 27
Department of the Interior and Related Agencies Appropriations Act, 2001, Pub. L. No. 106-291, § 701(a)(1), 114 Stat. 1024 27
Energy Policy Act of 1992, Pub. L. No. 102-486, Tit. XIX, § 19142(a)(2), 106 Stat. 3037 ..... 4, 18
Speedy Trial Act, 18 U.S.C. 3161 *et seq.* 16
Supplemental Appropriations Act of 1993, Pub. L. No. 103-50, ch. V, 107 Stat. 254 9
Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. 1201 *et seq.*:
30 U.S.C. 1231(c) 7
30 U.S.C. 1232(a) 8
30 U.S.C. 1232(h) 7
25 U.S.C. 2710(d)(8)(C) 17
25 U.S.C. 2710(e) 16-17
42 U.S.C. 1396n(h) (1994 & Supp. V 1999) 16
49 U.S.C. 15901(c) 17
Fed. R. Civ. P.:
Rule 54(b) 15
Rule 58 13

Miscellaneous:

Agency Management of the Implementation of the Coal Act: Hearing Before the Subcomm. on Oversight, Management, and Restructuring, and the District of Columbia of the Senate Governmental Affairs Comm., 105th Cong., 2d Sess. (1998) 10

Miscellaneous—Continued:	Page
Coal Industry Retiree Health Benefit Act of 1992: Hearing Before the Subcomm. on Oversight of the House Ways and Means Comm., 104th Cong., 2d Sess. (1995)	9, 10
138 Cong. Rec. 34,002 (1992)	18
General Accounting Office: *Analysis of the Administration's Proposal to Ensure Solvency of the United Mine Workers of America Combined Benefit Fund* (Aug. 15, 2000)	26, 27
Principles of Federal Appropriations Law (1991)	20
Provisions Relating to the Health Benefit of Retired Coal Miners: Hearing Before the House Ways and Means Comm., 103d Cong., 1st Sess. (1993)	8, 9
Staff of the House Comm. on Ways and Means, 103d Cong., 2d Sess., *Financing UMWA Coal Miner "Orphan Retiree" Health Benefits* (Comm. Print 1993)	9, 10, 25

In the Supreme Court of the United States

No.

JO ANNE B. BARNHART, COMMISSIONER OF SOCIAL SECURITY, PETITIONER

v.

PEABODY COAL COMPANY AND EASTERN ASSOCIATED COAL COMPANY

JO ANNE B. BARNHART, COMMISSIONER OF SOCIAL SECURITY, PETITIONER

v.

BELLAIRE CORPORATION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

The Solicitor General, on behalf of the Commissioner of Social Security, respectfully petitions for a writ of certiorari to review the judgments of the United States Court of Appeals for the Sixth Circuit in these cases.

OPINIONS BELOW

The opinion of the court of appeals in *Peabody Coal* (App., *infra*, 1a-2a) is unpublished, but the decision will be noted in a table in the *Federal Reporter*. The orders of the district court in *Peabody Coal* (App., *infra*, 5a-11a) are unreported.

The opinion of the court of appeals in *Bellaire* (App., *infra*, 3a-4a) is unpublished, but the decision will be

noted in a table in the *Federal Reporter*. The order of the district court in *Bellaire* (App., *infra*, 14a-25a) is unreported.

JURISDICTION

The judgment of the court of appeals in *Peabody Coal* was entered on June 21, 2001, and in *Bellaire* on June 22, 2001. On September 12, 2001, Justice Stevens extended the time within which to file a petition for a writ of certiorari in the two cases to and including October 19, 2001, and October 20, 2001, respectively. On October 10, 2001, Justice Stevens further extended the time within which to file a petition in the two cases to and including November 18, 2001, and November 19, 2001, respectively.

The jurisdiction of this Court in each case is invoked under 28 U.S.C. 1254(1). Because the judgments of the court of appeals involve an identical legal issue, a single petition for a writ of certiorari seeking review of both judgments is filed pursuant to this Court's Rule 12.4.

STATUTORY PROVISION INVOLVED

Section 9706(a) of Title 26, United States Code, provides:

> For purposes of this chapter, the Commissioner of Social Security shall, before October 1, 1993, assign each coal industry retiree who is an eligible beneficiary to a signatory operator which (or any related person with respect to which) remains in business in the following order:

> (1) First, to the signatory operator which—
>
> (A) was a signatory to the 1978 coal wage agreement or any subsequent coal wage agreement, and
>
> (B) was the most recent signatory operator to employ the coal industry retiree in the coal industry for at least 2 years.
>
> (2) Second, if the retiree is not assigned under paragraph (1), to the signatory operator which—
>
> (A) was a signatory to the 1978 coal wage agreement or any subsequent coal wage agreement, and
>
> (B) was the most recent signatory operator to employ the coal industry retiree in the coal industry.
>
> (3) Third, if the retiree is not assigned under paragraph (1) or (2), to the signatory operator which employed the coal industry retiree in the coal industry for a longer period of time than any other signatory operator prior to the effective date of the 1978 coal wage agreement.

STATEMENT

1. a. Congress enacted the Coal Industry Retiree Health Benefit Act of 1992 (Coal Act or Act), 26 U.S.C. 9701-9722 (1994 & Supp. V 1999), in response to a crisis that threatened to deprive more than 100,000 retired coal miners and their dependents of health-care benefits that had been promised under collective bargaining agreements. In the 1980s and 1990s, the financial

stability of private multi-employer plans that had been established by the coal industry to finance those benefits was threatened by increasing health-care costs and the termination of employers' contribution obligations as coal mine operators switched to non-union employees or left the coal mining business altogether. As more companies stopped contributing to the plans, the remaining contributors were forced to shoulder more of the costs, which in turn led to even more defections and created a downward spiral. See generally *Eastern Enters.* v. *Apfel*, 524 U.S. 498, 504-514 (1998) (plurality opinion).

Congress's objectives in enacting the Coal Act were to "identify persons most responsible for plan liabilities in order to stabilize plan funding and allow for the provision of health care benefits to [coal industry] retirees," to "allow for sufficient operating assets for [such] plans," and to "provide for the continuation of a privately financed self-sufficient program for the delivery of health care benefits to the beneficiaries of such plans." Pub. L. No. 102-486, Tit. XIX, § 19142, 106 Stat. 3037. In furtherance of those ends, the Coal Act established a private multi-employer plan known as the United Mine Workers of America Combined Benefit Fund (Combined Fund or Fund). The Combined Fund provides health-care benefits to individuals who, at the time the Act was passed, were receiving benefits from the multi-employer plans previously established by collective bargaining in the coal industry. See 26 U.S.C. 9702, 9703(f). The Combined Fund is financed principally by premiums paid by the "signatory operators" (or "related persons" of those signatory operators) that formerly employed the retired miners who are beneficiaries of the Fund, and that remain in business. 26 U.S.C. 9704, 9706(a). The Act defines "signatory

operator" as "a person which is or was a signatory to a coal wage agreement." 26 U.S.C. 9701(c)(1); see 26 U.S.C. 9701(b)(1) (identifying relevant "coal wage agreements").

b. The Act vests in the Commissioner of Social Security (Commissioner) the responsibility for assigning retired miners who are eligible for benefits from the Combined Fund to signatory operators or related persons of those operators. 26 U.S.C. 9706(a). Assignments are made according to a three-tiered hierarchy:

First, the Commissioner must first seek to assign a beneficiary to the signatory operator (or "related person") that remains "in business," signed a coal wage agreement in 1978 or later, and was the most recent signatory operator to employ the miner in the coal industry for at least two years. 26 U.S.C. 9706(a)(1). The Act specifies that "a person shall be considered to be in business if such person conducts or derives revenue from any business activity, whether or not in the coal industry." 26 U.S.C. 9701(c)(7).

Second, if an assignment of a particular beneficiary cannot be made under the first tier, the Commissioner must attempt to assign the beneficiary to the signatory operator (or related person) that remains in business, signed a coal wage agreement in 1978 or later, and was the most recent signatory operator to employ the miner in the coal industry for any period of time. 26 U.S.C. 9706(a)(2).

Third, if an assignment cannot be made under the first or second tier, the Commissioner must attempt to assign the beneficiary to the signatory operator (or related person) that remains in business and employed the miner in the coal industry for a longer period of time than any other signatory operator prior to the

effective date of the 1978 collective bargaining agreement. 26 U.S.C. 9706(a)(3).[1]

Finally, if an assignment cannot be made under any of the three tiers, then the beneficiary is considered "unassigned." See 26 U.S.C. 9704(a)(3) and (d). To assure that health-care benefits are paid for those beneficiaries, each signatory operator or related person that has been assigned a beneficiary may be assessed an additional "unassigned beneficiary premium" to be paid to the Combined Fund. 26 U.S.C. 9704(a). That premium represents each signatory operator's or related person's *pro rata* share of the total unmet benefit costs of unassigned beneficiaries. See 26 U.S.C. 9706(d) and (f). For example, if an operator were responsible for one percent of all assigned beneficiaries, it would also be responsible for one percent of the unmet benefit costs of all unassigned beneficiaries.

When the Commissioner assigns a Combined Fund beneficiary to a signatory operator or related person, he so notifies the assigned operator, 26 U.S.C. 9706(e)(2), which then has 30 days to request "detailed information as to the work history of the beneficiary and the basis of the assignment," 26 U.S.C. 9706(f)(1). After receiving that information, the assigned operator has an additional 30 days to request further administrative review of the assignment decision. 26 U.S.C. 9706(f)(2). If, on review, the Commissioner determines that an assignment was incorrect, she rescinds the

[1] In *Eastern Enterprises*, this Court struck down as unconstitutional an application of the third tier to a signatory operator that had not signed a 1974 or later coal wage agreement. See *Eastern Enters.*, 524 U.S. at 504 (plurality opinion); *id.* at 539 (opinion of Kennedy, J., concurring in the judgment and dissenting in part). The *Eastern Enterprises* decision is not relevant to this case, which involves only an issue of statutory construction.

assignment and reviews the beneficiary's record to determine whether the beneficiary should be assigned to another operator. 26 U.S.C. 9706(f)(3)(A). If the Commissioner determines that there was no error in the assignment, she so notifies the assigned operator. 26 U.S.C. 9706(f)(3)(B).

c. The Coal Act also provided two additional sources of financing for the health-care benefits of unassigned beneficiaries; signatory operators (and their related persons) may be required to pay an additional unassigned-beneficiary premium only if those two other sources prove insufficient for the benefit costs of unassigned beneficiaries. First, the Act directed that $210 million be transferred from the 1950 United Mine Workers of America Pension Plan, a multi-employer plan that had been established to finance retirement benefits of miners who had retired before 1976. A portion of those transfers was to be applied to reduce any unassigned-beneficiary premium liability for plan years commencing on or after October 1, 1993, while those funds remained available. See 26 U.S.C. 9705(a)(1) and (3)(B). In addition, for fiscal years beginning on or after October 1, 1995, the Coal Act authorizes transfers of interest earned on the Department of the Interior's Abandoned Mine Land Reclamation Fund (AML Fund), and specifies that those transferred monies are to be used to reduce the unassigned-beneficiary premium liability for the fiscal year in which the transfer is made. 26 U.S.C. 9705(b); 30 U.S.C. 1232(h).[2]

[2] The AML Fund was established by the Surface Mining Control and Reclamation Act of 1977 for the purpose or reclaiming and restoring land and water resources adversely affected by past coal mining. See 30 U.S.C. 1231(c). The AML Fund is financed by fees

2. The first full fiscal year of Combined Fund operations (termed a "plan year" under the Act) was scheduled to begin on October 1, 1993. See 26 U.S.C. 9702(c).[3] Congress directed that premium payments were to commence during the fiscal year beginning on that date. See 26 U.S.C. 9704(g)(1). In accordance with that time frame, the Coal Act provided that "the Commissioner of Social Security shall, before October 1, 1993, assign each coal industry retiree who is an eligible beneficiary to a signatory operator." 26 U.S.C. 9706(a).

For several reasons, however, the Commissioner was unable to complete the assignments of all beneficiaries before October 1, 1993.[4] First, the Coal Act itself did not authorize or appropriate any funds to carry out the assignment process, and the Social Security

---

assessed on coal operators for each ton of coal produced. See 30 U.S.C. 1232(a).

[3] The Fund actually commenced operations on February 1, 1993. See 26 U.S.C. 9702(a), 9703(b)(4). Before October 1, 1993, benefits provided by the Fund were financed through other means, including interim contributions from signatories to the 1988 national coal wage agreement and a $70 million transfer from the 1950 UMWA Pension Plan. See 26 U.S.C. 9704(i)(1)(A), 9705(a).

[4] SSA was responsible for assigning about 80,000 retired miners who were receiving benefits under the predecessor multi-employer benefit plans. Members of the Bituminous Coal Operators' Association provided the agency with a list of coal operators who voluntarily acknowledged responsibility for about 15,000 of those retired miners. Thus, SSA was required to undertake a case-by-case evaluation of earnings records and employment history for about 65,000 individuals. See *Provisions Relating to the Health Benefits of Retired Coal Miners: Hearing Before the House Ways and Means Comm.*, 103d Cong., 1st Sess. 24 (1993) (*1993 House Hearing*) (statement of Acting Commissioner Lawrence H. Thompson). We are informed that SSA completed approximately 55,300 of the remaining 65,000 assignments before October 1, 1993.

Administration (SSA) determined that it was not legally authorized to use Social Security trust funds for that purpose. Congress was therefore required to provide SSA with such authority in a supplemental appropriation act, which appropriated $10,000,000, "to remain available until expended," to enable SSA to make initial assignments, review assignments on requests for reconsideration, and calculate the initial health-benefit premium. That supplemental appropriations act was enacted on July 2, 1993, only three months before the date, October 1, 1993, on which the Combined Fund's operations were first financed through premiums from assigned operators. See Supplemental Appropriations Act of 1993, Pub. L. No. 103-50, ch. V, 107 Stat. 254.[5]

Second, although the Coal Act required the predecessor multi-employer funds to provide SSA with the names and social security numbers of the retired miners who would be beneficiaries of the Combined Fund, those records were inadequate for completion of the assignment task. In many cases, those records did not contain sufficient information to allow SSA to identify the signatory operator that was the miner's employer, or to determine whether any particular related person could be assigned responsibility for a miner if the original operator was defunct. SSA reviewed

---

[5] See also *Coal Industry Retiree Health Benefit Act of 1992: Hearing Before the Subcomm. on Oversight of the House Ways and Means Comm.*, 104th Cong., 2d Sess. 25 (1995) (*1995 House Hearing*) (statement of Deputy Commissioner Lawrence H. Thompson); Staff of the House Comm. on Ways and Means, 103d Cong., 2d Sess., *Financing UMWA Coal Miner "Orphan Retiree" Health Benefits* 64-65 (Comm. Print 1993) (*Financing Orphan Benefits*); *1993 House Hearing* 23 (statement of Acting Commissioner Thompson).

records of thousands of corporate transactions obtained from far-flung and disparate sources to determine whether retired miners could be assigned to related persons of signatory operators. In addition, most of the social security employment records for the retired miners who were beneficiaries of the Combined Fund were not computerized and had to be searched manually.[6]

Finally, operators requested administrative review of SSA's assignments in thousands of cases. As of 1998, SSA had reviewed assignments for approximately 665 coal operators concerning 36,256 miners (out of a total of approximately 80,000 retired miners who were beneficiaries of the Combined Fund). That process of administrative review yielded new initial assignments, as SSA learned for the first time the proper identities of employers (or the related persons) of miners that were previously thought to be unassigned or had been assigned to the wrong operator.[7]

3. Several signatory operators that had received their initial assignments of miners on or after October 1, 1993, raised judicial challenges to those assignments. They contended that the Commissioner had no authority to make any such assignments on or after October 1, 1993. In *Dixie Fuel Co.* v. *Commissioner of Social Security*, 171 F.3d 1052 (1999) (App. *infra*., 27a-50a), the Sixth Circuit agreed with those contentions. The

---

[6] *1995 House Hearing* 24-25, 28-29; *Financing Orphan Benefits* 64-65.

[7] See *Agency Management of the Implementation of the Coal Act: Hearing Before the Subcomm. on Oversight, Management, and Restructuring, and the District of Columbia of the Senate Governmental Affairs Comm.*, 105th Cong., 2d Sess. 60-61 (1998) (*1998 Senate Hearing*).

Sixth Circuit in turn relied on its decision in *Dixie Fuel* to invalidate the assignments made to respondents in these cases on or after October 1, 1993. See p. 15, *infra*.

The Sixth Circuit found it significant in *Dixie Fuel* that the Coal Act provided that the Commissioner "shall" make the assignments before October 1, 1993, and that "'shall' is explicitly mandatory language." *Dixie Fuel*, 171 F.3d at 1061 (internal quotation marks omitted); App., *infra*, 43a. The court acknowledged that Congress's use of the word "shall" to impose a duty on a government official to act by a certain date, "standing alone," is ordinarily insufficient to terminate the power of the government official to act beyond that date. See 171 F.3d. at 1062; App., *infra*, 44a. The court believed however, that the Coal Act's provisions governing the computation of unassigned-beneficiary premiums rest on the premise that all assignments of beneficiaries would have been made before October 1, 1993. In particular, it noted that each signatory operator's *pro rata* unassigned-beneficiary premium is determined by dividing the total number of beneficiaries assigned to that operator by the total number of beneficiaries assigned to all operators, "determined on the basis of assignments as of October 1, 1993." 26 U.S.C. 9704(f)(2); see *Dixie Fuel*, 171 F.3d at 1062; App., *infra*, 45a-47a. The court recognized that that quotient may be adjusted for following plan years, to reflect possible changes in assignments after October 1, 1993—if, for example, operators successfully challenge assignments as having been made to the wrong person. But, the court reasoned, "those adjustments are all premised on the assignments' having been completed before October 1, 1993." *Id.* at 1063; App., *infra*, 47a.

The government argued in *Dixie Fuel* that the court should defer, under *Chevron U.S.A. Inc.* v. *Natural*

Resources Defense Council, Inc., 467 U.S. 837, 842-843 (1984), to the Commissioner's determination that Congress's specification of the October 1, 1993, date by which assignments were to be made did not divest her of authority to make initial assignments after that date. See 171 F.3d at 1062-1064; App., *infra*, 48a-50a. The court rejected that argument, stating that "the statute is clear [and] the agency has nothing to interpret." 171 F.3d at 1064; App., *infra*, 50a.[8]

4. In the two decisions at issue in this case, the Sixth Circuit invalidated assignments made by the Commissioner after October 1, 1993, on the authority of its decision in *Dixie Fuel*. App., *infra*, 1a-2a, 3a-4a.

a. The respondents in *Peabody* allege that they were improperly assigned responsibility for 330 beneficiaries of the Combined Fund on or after October 1, 1993. Although SSA initially determined that those beneficiaries would have to be deemed unassigned because (it believed) the miners' employers were no longer in

[8] The government sought rehearing and rehearing en banc in *Dixie Fuel*. In the petition for rehearing, the government renewed its submission (which the panel had rejected, see 171 F.3d at 1056-1057; App., *infra*, 32a-33a) that the case was moot because the assignments to Dixie Fuel were invalid on another, independent basis: they could not be sustained in light of this Court's decision in *Eastern Enterprises* invalidating certain third-tier assignments on constitutional grounds. See p. 6, note 1, *supra*. Indeed, while *Dixie Fuel's* appeal from the district court's denial of preliminary injunctive relief was pending in the Sixth Circuit, the district court entered final judgment for *Dixie Fuel* on that independent ground, and the Commissioner argued to the court of appeals that the case was moot on that basis as well. See *University of Tex.* v. *Camenisch*, 451 U.S. 390, 393-394 (1981). Nonetheless, the Sixth Circuit denied rehearing. With the case in that posture, the Solicitor General did not seek review of the Sixth Circuit's decision in this Court.

business, the Commissioner subsequently obtained information showing that the miners had been employed by respondents or by a related company, and assigned those miners to Respondents. See *Peabody* C.A. App. 13-14, 24-26.

Respondents challenged those assignments in federal district court. They alleged, among other things, that the assignments were invalid under the Sixth Circuit's decision in *Dixie Fuel*.[9] The district court granted respondents partial summary judgment on that claim. App., *infra*, 7a-8a. It declared "that all initial assignments the Commissioner * * * made to [respondents] after September 30, 1993 are null and void," and enjoined the Commissioner from making similar initial assignments to respondents in the future. *Id.* at 7a (emphasis omitted).[10]

b. In *Bellaire*, respondents are a company (Bellaire) that has been assigned responsibility for beneficiaries

[9] In *Dixie Fuel*, the Sixth Circuit held that the assigned operators could seek judicial review of the Commissioner's assignment determinations without exhausting the administrative remedies set forth in 26 U.S.C. 9706(f). 171 F.3d at 1059; App., *infra*, 36a-39a. Respondents in *Peabody* likewise filed suit directly in district court without seeking administrative review of the Commissioner's initial decision, and so there is no administrative review decision in the record explaining in detail the basis of the Commissioner's assignment determinations. The Commissioner did not argue below that respondents were required to exhaust their administrative remedies before maintaining this action.

[10] The *Peabody* respondents' complaint set forth additional counts challenging the assignments on other grounds, but those other claims were all dismissed pursuant to a stipulation and by a separate order of the court. See App., *infra*, 9a-13a. After all the claims raised in the complaint were resolved, the district court entered a separate final judgment for the *Peabody* respondents pursuant to Federal Rule of Civil Procedure 58. App., *infra*, 5a.

of the Combined Fund, and its corporate affiliates. They filed suit against the Commissioner in federal district court, challenging the application of the statute on several grounds. They alleged that the Commissioner had made 270 initial assignments of beneficiaries to Bellaire after September 30, 1993, in violation of 26 U.S.C. 9706(a) of the Coal Act as construed by the Sixth Circuit in *Dixie Fuel*. See *Bellaire* C.A. App. 24-26, 82-84.[11]

The district court granted partial summary judgment for respondents. App., *infra*, 12a-13a. It concluded that the challenged assignments are indistinguishable from those invalidated in the *Dixie Fuel* case and are therefore void as a matter of law. *Id.* at 20a-21a. It also held that the Combined Fund (the Trustees of which intervened as defendants, and are respondents here) was required to credit prior payments made by respondents to the Combined Fund for those beneficiaries against

[11] Like the respondents in *Peabody*, respondents in *Bellaire* did not, at the time the assignments were made, seek reconsideration of the assignments through the administrative remedies set forth in the Coal Act. After *Dixie Fuel* was decided, the *Bellaire* respondents asked the Commissioner to withdraw several allegedly untimely assignments, in light of the Sixth Circuit's decision. The Commissioner denied that request. The Commissioner explained that the agency had decided to withdraw assignments on the basis of the *Dixie Fuel* decision only if the signatory operator resided within the Sixth Circuit and was challenging an assignment made after *Dixie Fuel* was decided. See *Bellaire* C.A. App. 216-217. The Department of Justice and the Commissioner had determined, after consultation in light of the *Dixie Fuel* decision, the mootness of the *Dixie Fuel* case itself, and the Solicitor General's decision not to file a certiorari petition in *Dixie Fuel* (see p. 12, note 8, *supra*), that the government would examine avenues of securing further review of the issue within the Sixth Circuit or in this Court, if possible.

their future obligations for other beneficiaries. *Id.* at 21a. The court then directed entry of final judgment on those claims under Federal Rule of Civil Procedure 54(b). App., *infra*, 12a-13a, 22a-24a.

c. The Commissioner appealed to the Sixth Circuit in each case, and also petitioned for initial hearing en banc for the purpose of seeking reconsideration of *Dixie Fuel*. The court of appeals denied those petitions. App., *infra*, 26a. The court then issued brief *per curiam* opinions affirming the district court's judgment in each case, explaining that the panel was bound to follow the circuit precedent in *Dixie Fuel*. *Id.* at 1a-2a, 3a-4a.

REASONS FOR GRANTING THE PETITION

The Sixth Circuit has held that, under the Coal Act, the Commissioner of Social Security had no authority to make any initial assignments of retired miners to signatory operators on or after October 1, 1993, and on that basis it invalidated the assignments of the miners at issue in these two cases. That court's reading of the Coal Act is incorrect. It conflicts directly with the recent decision of the Fourth Circuit in *Holland* v. *Pardee Coal Co.*, No. 00-1770, 2001 WL 1244840 (Oct. 18, 2001), which upheld the Commissioner's authority to make such assignments. The court of appeals' construction of the Coal Act, if allowed to stand, could lead to a significant disruption of the statutory funding scheme established by Congress to protect the health-care benefits of tens of thousands of retired coal miners and their dependents. This Court's review is therefore warranted.

1. The Sixth Circuit erred in ruling that Section 9706(a)'s provision that initial assignments were to be made before October 1, 1993, divested the Commissioner of authority to make any such assignments on or

after that date. This Court long ago made clear that "many statutory requisitions intended for the guide of officers in the conduct of business devolved upon them * * * do not limit their power or render its exercise in disregard of the requisitions ineffectual." *French* v. *Edwards*, 80 U.S. (13 Wall.) 506, 511 (1872). With specific regard to statutory provisions directing federal agencies to take action by or within a given time, the Court has stressed that it is "most reluctant to conclude that every failure of an agency to observe a procedural requirement voids subsequent agency action, especially where important public rights are at stake." *Brock* v. *Pierce County*, 476 U.S. 253, 260 (1986). Accordingly, the Court has held that, "if a statute does not specify a consequence for [agency] noncompliance with statutory timing provisions, the federal courts will not in the ordinary course impose their own coercive sanction." *United States* v. *James Daniel Good Real Prop.*, 510 U.S. 43, 63 (1993); see also *United States* v. *Montalvo-Murillo*, 495 U.S. 711, 717-718 (1990).

Nothing in the Coal Act suggests that the Commissioner's assignment authority terminated on October 1, 1993. Congress could easily have provided that, if assignments were not completed by October 1, 1993, the Commissioner should have no further authority to assign a beneficiary to a signatory operator or related person, and that any untimely assignments would be deemed invalid. Congress has, in fact, specifically provided in various statutes that an agency's authority to act terminates upon expiration of a certain period.[12]

[12] See, *e.g.*, 42 U.S.C. 1396n(h) (1994 & Supp. V 1999) (application for waiver of Medicaid requirements must be deemed approved if Secretary of Health and Human Services does not issue a decision within 90 days); 25 U.S.C. 2710(e) (proposed tribal gaming ordinance must be deemed approved if agency fails to disapprove ordinance within 90 days); 25 U.S.C. 2710(d)(8)(C) (proposed state-tribal compact must be deemed approved if Secretary of the Interior fails to disapprove compact within 45 days); 49 U.S.C. 15901(c) (Surface Transportation Board investigative proceeding automatically dismissed if not completed within three years); see also 18 U.S.C. 3161 *et seq.* (Speedy Trial Act).

The Coal Act, however, contains no such provision. That omission is itself highly significant, for Congress enacted the Coal Act against the background of this Court's precedents, including *Pierce County* and *Montalvo-Murillo*, making clear that a statutory requirement that an agency take action by or within a certain time does not, by itself, divest the agency of authority or jurisdiction to act beyond that time. Congress is presumed to have been aware that, under those decisions, a statutory provision that an agency "shall" take action by a certain date will not, without more, be construed to terminate an agency's authority after that date. See *United States* v. *Wells*, 519 U.S. 482, 495 (1997).

Nor does the Coal Act manifest any congressional intent to impose a "consequence" upon the Commissioner if she failed to make assignments as of October 1, 1993. In the first place, unlike other cases (such as *Pierce County*, *Montalvo-Murillo*, and *James Daniel Good*), where it was argued (unsuccessfully) that Congress wanted the agency to lose the authority to enforce a statutory provision as a punishment for missing deadlines, no such consequence could be visited upon SSA, which does not itself "enforce" the Coal Act in that sense, and does not pay benefits to retirees and their dependents under the Act. SSA's functions are limited to assigning beneficiaries to operators and calculating the per-beneficiary premium that those

operators must pay to the Combined Fund. See 26 U.S.C. 9704, 9706. The Combined Fund, not SSA, then pays for the health care of beneficiaries and pursues actions against assigned operators that do not pay their premiums. SSA's assignments thus take place under a statutory framework that establishes relationships among *private* parties to provide for the funding of health-care benefits.

In addition, if the Sixth Circuit's decisions are is allowed to stand, the loss of premiums to the Combined Fund from operators that were assigned beneficiaries on or after October 1, 1993, will in turn have adverse consequences on the Department of the Interior's AML Fund and on other, private parties, not on SSA. Under the *Dixie Fuel* decision, retired miners who were initially assigned to a signatory operator after that date are likely to be deemed unassigned, and the cost of financing their benefits will be shifted to transfers from the AML Fund or, if such funds are not available, onto a further *pro rata* contribution from all coal operators who have been assigned beneficiaries. See p. 7, *supra*. No precedent of which we are aware supports visiting the consequences of an agency's failure to meet a time requirement onto other, innocent entities in such a fashion.

The Sixth Circuit's reading thus frustrates Congress's objective, expressed in the Coal Act itself, of ensuring that the costs of providing health-care benefits are, to the extent possible, borne by the "persons most responsible for plan liabilities." Energy Policy Act of 1992, Pub. L. No. 102-486, § 19142(a)(2), 106 Stat. 3037. The "overriding purpose" of the assignment provisions of the Coal Act was "to find and designate a specific obligor for as many beneficiaries in the Plans as possible." 138 Cong. Rec. 34,002 (1992) (explanation by

Sen. Wallop). In erecting the three-tier assignment structure in Section 9706(a), Congress manifested its intent that miners should be deemed unassigned only as a last resort, when no employer (or related person) falling within the statutory criteria could be identified. The Sixth Circuit's reading directly undermines that purpose by shifting the obligation for a retired miner's benefits away from the operator that employed the miner (or a related person) to the unassigned pool, even when the actual employer's responsibility for that miner under the Coal Act is patently clear.

The notion that Congress intended to impose an absolute cut-off point for all assignment determinations is particularly inconsistent with Congress's decision to impose funding responsibilities, not just on original signatories of collective bargaining agreements promising benefits, but also on a wide range of related business entities. See 26 U.S.C. 9701(c)(2), 9706(a). To comply with that aspect of the statutory scheme, SSA was required to trace many complex changes in business ownership and control as it sought to identify the entity responsible for a miner's benefits. See pp. 9-10, *supra*. Information about such changes in corporate ownership and control was not available from any single, central repository, but was pieced together from information obtained from the Combined Fund, other signatory operators, retired miners, and public records. It is scarcely conceivable that Congress would have imposed an absolute "jurisdictional" bar on the ability of the Commissioner to complete that undertaking when, in a significant number of cases, decisions depended on information that was not within the Commissioner's possession when the Coal Act was passed.

Indeed, in part because the task of assigning miners was so complicated, Congress provided SSA with a

supplemental appropriation of $10 million to carry out that task. That appropriation law was enacted only three months before October 1, 1993—the date the court of appeals held to be an absolute cut-off point for all initial assignments—at a time when Congress knew that the initial assignment process had not even *begun*, because SSA had determined that it could not use the Social Security trust fund for Coal Act purposes. See pp. 8-9, *supra*. In those circumstances, it is not surprising that Congress expressly provided that the supplemental appropriation would not expire at the end of the fiscal year, but would remain available "until expended." See p. 9, *supra*.[13]

The Sixth Circuit believed that an intent on the part of Congress that all initial assignment decisions must be made before October 1, 1993, or not at all, was reflected in the fact that, under 26 U.S.C. 9704(f)(1), assigned operators' potential exposure to *pro rata* contribution liability for unassigned beneficiaries is fixed according to their proportionate share of all assigned beneficiaries as of that date. See *Dixie Fuel*, 171 F.3d at 1062-1063; App., *infra*, 46a-47a. But as the Sixth Circuit also noted, the Coal Act provides that that proportionate share may be adjusted in following years, to take account of changed circumstances, such as the possibility that assigned operators might go out of business and their beneficiaries might have to be deemed unassigned. See *Dixie Fuel*, 171 F.3d at 1063; App., *infra*, 47a; 26 U.S.C. 9704(f)(2)(B). In addition, if the Commissioner determines, upon administrative review of an assignment decision, that the initial assignment was incorrect, he may reassign the beneficiary to another signatory operator (if such is available), and each operator's proportionate share may be adjusted to reflect such reassignments as well. See *Dixie Fuel*, 171 F.3d at 1063; App., *infra*, 47a; 26 U.S.C. 9704(f)(2)(A), 9706(f); pp. 6-7, *supra*. Thus, each assigned operator's proportionate share of unassigned-beneficiary liability, while determined as of October 1, 1993, is not fixed in concrete, but instead must be adjusted to reflect changed circumstances. There is no reason why there should be a unique bar to making any initial assignments after that date.

Finally, to the extent that the Coal Act is ambiguous on the question, the Commissioner's construction is entitled to deference. The Commissioner's conclusion that she retains assignment powers after October 1, 1993, is certainly not contradicted by anything in the statutory text; it furthers the Coal Act's objectives; and it is consistent with background principles set forth in decisions of this Court. That conclusion also reflects the Commissioner's practical experience in carrying out the enormously complex assignment tasks under the Coal Act—namely, that the function simply could not be completed, in the manner that the Act contemplated, before October 1, 1993. The Commissioner's reading of the Act therefore should be sustained. See *United States* v. *Mead Corp.*, 121 S. Ct. 2164, 2171-2174 (2001); *Chevron U.S.A. Inc.* v. *Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842-843 (1984).

2. The decisions below, and the *Dixie Fuel* decision on which they rest, are in direct conflict with the Fourth Circuit's decision in *Holland* v. *Pardee Coal*

---

[13] See General Accounting Office, *Principles of Federal Appropriations Law* 5-6 (1991) (explaining that the phrase "until expended" is used in appropriation acts to make clear that "all statutory time limits as to whether the funds may be obligated and expended are removed").

Co., No. 00-1770, 2001 WL 1244840 (Oct. 18, 2001).[14] Whereas the Sixth Circuit held in *Dixie Fuel* that Section 9706(a) extinguished the Commissioner's power to make assignment determinations as of October 1, 1993, 171 F.3d at 1064, the Fourth Circuit in *Pardee* expressly rejected the Sixth Circuit's decision and arrived at the "opposite conclusion," namely, that the Coal Act "clearly allows the SSA to exercise its assignment authority, including the authority to make new assignments, after October 1, 1993." *Pardee*, 2001 WL 1244840, at *4 (footnote omitted).

In *Pardee*, the Fourth Circuit rejected all of the Sixth Circuit's rationales for its decision in *Dixie Fuel*. First, the Fourth Circuit concluded that the text of the Coal Act gives no indication that Congress divested the agency of authority to make assignments after October 1, 1993. Although the court noted that the Coal Act provides that the Commissioner "shall" make assignments by that date, it observed that, under this Court's decisions in cases such as *Pierce County*, *Montalvo-Murillo*, and *James Daniel Good*, Congress's use of the word "shall" to direct an agency to take an action by or within a particular period, by itself, "is insufficient textual evidence to establish that Congress intended such a provision to be jurisdictional." 2001 WL 1244840, at *6. Second, the Fourth Circuit disagreed with the Sixth Circuit's reasoning that, under Section 9704(f), assigned operators' share of potential *pro rata* liability must be definitively fixed as of October 1, 1993. The court noted, rather, that "the number of unassigned beneficiaries has been changed on numerous occasions throughout the history of the Combined

[14] On November 14, 2001, the Fourth Circuit denied a petition for rehearing and rehearing en banc in *Pardee*.

Fund, and the statute expressly contemplates that possibility." *Id.* at *7 (internal citation omitted).

The *Pardee* court also explained that the Coal Act in general "subordinate[s] the coal operators' interest, if any, in finalizing assignments by October 1, 1993, to the overriding interest in ensuring that such assignments are fair and accurate." 2001 WL 1244840, at *7. It therefore stressed that terminating the Commissioner's assignment power as of October 1, 1993, would be inconsistent with the Coal Act's "overriding purpose" of placing responsibility for a miner's benefits on the operator that had actually employed that miner (or on some related person to that operator), rather than placing miners in the unassigned-beneficiary pool. *Id.* at *8. Noting also that "[t]he funding implications of [the view it rejected] are significant," the court observed that, if certain operators could "avoid liability for individual beneficiaries—and thus enjoy a proportionate reduction in their contributions for unassigned beneficiaries—simply because some assignments were 'untimely[,]'" they would obtain a "financial windfall * * * at the expense of other operators * * * and, more importantly, the public interest." *Id.* at *9.

The conflict between the Fourth and Sixth Circuits is particularly deserving of this Court's review because this issue disproportionately affects coal operators located in those circuits, where much of the extractive bituminous coal mining operations governed by the national coal wage agreements that led to the adoption of the Coal Act were carried out. We have been informed by SSA that 390 companies were assigned responsibility for miners on or after October 1, 1993. Of those companies, 211, or more than half, are located in the Fourth and Sixth Circuits: 155 in the Fourth Circuit, and 56 in the Sixth Circuit. Thus, the conflict-

ing court of appeals decisions already govern more than half of the cases that might be brought concerning this issue.[15]

3. This Court's review is also warranted because the Sixth Circuit's construction of the Coal Act in *Dixie Fuel* threatens to erode the financial stability of the Combined Fund and, ultimately, the efficaciousness of the Coal Act. The Commissioner's authority to assign beneficiaries on or after October 1, 1993, has been important to the attainment of Congress's express objective of creating a stable, privately-financed benefit plan paid for by the businesses that Congress deemed most responsible for the health-care benefits of retired coal miners and their dependents. If the Commissioner is now held to have lacked the authority to make any assignments on or after October 1, 1993, a large number of miners will become "orphaned" once again. Responsibility for their benefits will then be shifted to the public and to other mine operators, in contravention of Congress's intent that those methods of financing are a last resort. See pp. 4-7, *supra*.

The validity of assignments made on or after October 1, 1993, affects a significant proportion of Coal Act assignments, and thus threatens to have a significant impact on the funding of benefits under the Act. We have been informed by SSA that, of the approximately 80,000 retired miners who were eligible to receive benefits from the Combined Fund when the Coal Act was passed, approximately 7500 miners were initially

[15] In addition, the same issue, along with other issues, is currently pending before the Third Circuit in *Shenango, Inc.* v. *Barnhart*, No. 00-2525 (argued Sept. 19, 2001); 97 companies located in the Third Circuit were assigned miners on or after October 1, 1993.

assigned by SSA to a signatory operator or a related person on or after October 1, 1993.[16] Moreover, the issue presented here affects the funding for the health care of an even larger number of *beneficiaries*, because responsibility to the Combined Fund for the benefits of miners' eligible spouses and dependents is contingent on the assignment of the related miner. The issue presented thus potentially affects the funding for the benefits of more than 10,000 of the approximately 114,000 beneficiaries who were eligible to receive benefits from the Combined Fund at the time the Act was passed.[17]

The wholesale invalidation of beneficiary assignments made on or after October 1, 1993, would significantly reduce the Combined Fund's revenues from assigned-beneficiary premiums. The General Account-

[16] Approximately 2100 more miners were determined by SSA to be unassigned on or after October 1, 1993.

[17] SSA has information only on assignments of retired miners, not spouses and dependents, because SSA was not made responsible under the Coal Act for determining the identities of spouses and dependents of retired miners who are eligible for benefits under the Fund. It is known, however, that SSA made approximately 80,000 assignments of retired miners under the Coal Act, and that at its inception the Combined Fund had approximately 114,000 beneficiaries. See *Financing Orphan Benefits* 22. Thus, on average, each *miner* assignment likely accounts for approximately 1.4 *beneficiary* assignments under the statute.

Some beneficiaries of the Combined Fund have died since the inception of the Fund, but the issue presented in this case nonetheless at least potentially affects the financing for the health-care benefits that the Fund provided them before their death. Signatory operators may demand that the Fund refund them the premiums that they paid in previous years for beneficiaries who were assigned after October 1, 1993, or credit that amount against premium amounts that they must pay in future years for other beneficiaries.

ing Office has estimated that invalidation of such assignments on a nationwide basis could require the Combined Fund to make net refunds of $57 million in premium revenues collected for prior fiscal years. See General Accounting Office, *Analysis of the Administration's Proposal to Ensure Solvency of the United Mine Workers of America Combined Benefit Fund* 7 (Aug. 15, 2000) (*GAO Analysis*).[18] The Combined Fund would also lose substantial assigned-beneficiary premium revenues in future fiscal years.[19]

The Combined Fund would, of course, have to look elsewhere to recover those lost revenues.[20] Presum-

[18] In a declaration filed in the *Pardee* litigation, the Combined Fund projected that implementation of *Dixie Fuel* would require a refund of $105 million in previously collected premiums, and that those refunds would be partially offset by the levy of an additional *unassigned* beneficiary premium on remaining signatory operators of approximately $48 million—thus leaving, as the GAO stated, a "net" premium refund of $57 million for prior fiscal years. The Combined Fund also estimates that an additional transfer from the AML Fund of between $60-80 million would be required to cover the increased unassigned-beneficiary liability for prior fiscal years through September 30, 1999. See C.A. App. 46, *Holland* v. *Pardee Coal Co.*, No. 00-1770 (4th Cir. Oct. 18, 2001).

[19] The yearly revenue loss decreases with each succeeding fiscal year because of mortality in the pertinent beneficiary population. Nonetheless, our understanding is that, even assuming that only 4000 retired miners whose assignments were made after October 1, 1993, survive—or less than half the number of retired miners whose assignments were initially made after October 1, 1993—the Combined Fund would still lose more than $10 million per year in revenue from assigned-beneficiary premiums if assignments made after October 1, 1993, are deemed invalid. That understanding is based on the fact that the assigned-beneficiary premium in effect for Fiscal Year 2001 is about $2700 for each individual.

[20] Even without the loss of assigned-beneficiary premium revenues resulting from the *Dixie Fuel* decision, the Combined Fund

ably, the Fund would look first to interest earned on the AML Fund; if that source proved insufficient to cover the costs of providing benefits, the Fund would then be required to impose an unassigned beneficiary premium on all assigned operators. See p. 7, *supra*. But those alternative sources of revenue are not inexhaustible. The recent steep decline in interest rates may reduce the amount of interest that may be earned on the AML Fund in future years, and in any event the AML Fund is principally intended to rectify the serious

faces serious financial difficulties. In August 2000, the GAO reported that, for Fiscal Years 2002 through 2008, the Combined Fund was projected to experience operating shortfalls of $58 million or more in each year. *GAO Analysis* 26. The GAO concluded that those financial difficulties resulted from several causes, including rising health-care costs and a financing mechanism that had been adversely affected by court decisions, including this Court's decision in *Eastern Enterprises* and the Sixth Circuit's *Dixie Fuel* decision. *Id.* at 1-2, 22-25.

Congress has twice enacted supplemental appropriations to bolster the Combined Fund's financial condition. In November 1999, Congress authorized an additional $68 million transfer from the AML Fund, over and above the transfers authorized by the Coal Act, to cover any shortfall in the Fund's premium accounts. Consolidated Appropriations Act, 2000, Pub. L. No. 106-113, § 501, 113 Stat. 1501A-214. In October 2000, Congress authorized another transfer from the AML Fund, "in such amounts as estimated by the trustees of such [Combined Benefit] Fund to offset the amount of any deficit in net assets in the Combined Fund through August 31, 2001." Department of the Interior and Related Agencies Appropriations Act, 2001, Pub L. No. 106-291, § 701(a)(1), 114 Stat. 1024. Those additional appropriations address the Fund's operating deficit in prior years (aside from the possibility that further assignments made on or after October 1, 1993, might be invalidated), but they do not remedy the substantial operating deficits the Combined Fund has been projected to incur in Fiscal Year 2002 and beyond.

threat to public health and safety posed by abandoned coal mines. Furthermore, some assigned operators might cease coal mining operations and go out of business entirely rather than shoulder the increased costs associated with their unassigned-beneficiary premiums. Thus, the *Dixie Fuel* decision portends a possible return to the same downward spiral of increasing costs and fewer payers that led Congress to enact the Coal Act.

Congress devised the Combined Fund's premium-based financing mechanism to avoid that prospect. Congress intended that responsibility for retired miners' health-care costs would rest with businesses that Congress deemed most responsible for the benefits promised to miners and their dependents. The decisions below, however, and the *Dixie Fuel* holding on which they rely, undermine Congress's intent to create a stable, privately-financed system for financing health care benefits. For that reason, and because the decisions below and in *Dixie fuel* squarely conflict with the Fourth Circuit's decision in *Holland* v. *Pardee Coal Co.*, this Court's review is warranted.

CONCLUSION

The petition for a writ of certiorari should granted.

Respectfully submitted.

THEODORE B. OLSON
Solicitor General
ROBERT D. MCCALLUM, JR.
Assistant Attorney General
EDWIN S. KNEEDLER
Deputy Solicitor General
PAUL R.Q. WOLFSON
Assistant to the Solicitor General
WILLIAM KANTER
JEFFREY CLAIR
Attorneys

NOVEMBER 2001

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 00-6239

PEABODY COAL COMPANY; EASTERN ASSOCIATED COAL CORPORATION, PLAINTIFFS-APPELLEES

v.

LARRY G. MASSANARI, ACTING COMMISSIONER OF SOCIAL SECURITY, DEFENDANT-APPELLANT

On Appeal from the United States District Court for the Western District of Kentucky

---

Filed: June 21, 2001

MEMORANDUM OPINION

Before: MARTIN, Chief Judge; NORRIS, Circuit Judge; and QUIST, District Judge.*

PER CURIAM. The sole issue presented to us upon appeal is whether the Commissioner of Social Security had authority under the Coal Industry Retiree Health Benefit Act of 1992, 26 U.S.C. § 9701 *et seq.* ("Coal Act"), to make initial assignments of beneficiaries to coal operators after October 1, 1993. This court has

---

* The Honorable Gordon J. Quist, United States District Judge for the Western District of Michigan, sitting by designation.

already held that the Commissioner lacks such authority. *See Dixie Fuel Co.* v. *Comm'r of Soc. Sec.*, 171 F.3d 1052 (6th Cir. 1999).

Recognizing that *Dixie Fuel* controls our disposition of this case, the government concedes that this panel must affirm the district court's decision to declare all initial assignments made after October 1, 1993, null and void. We agree. "[A] subsequent panel of this circuit court is powerless to revisit, modify, amend, abrogate, supersede, set aside, vacate, avoid, nullify, rescind, overrule, or reverse any prior Sixth Circuit panel's published precedential ruling of law." *United States* v. *Dunlap*, 209 F.3d 472, 481 (6th Cir. 2000); *see also* 6th Cir. R. 206(c) ("Court en banc consideration is required to overrule a published opinion of the court."). Our decision in *Dixie Fuel* thus controls until and unless "an inconsistent decision of the United States Supreme Court requires modification of the decision or this Court sitting en banc overrules the prior decision." *United States* v. *Smith*, 73 F.3d 1414, 1418 (6th Cir. 1996) (quoting *Salmi* v. *Sec'y of Health and Human Servs.*, 774 F.2d 685, 689 (6th Cir. 1985)).

We therefore **affirm** the district court's grant of summary judgment to the plaintiffs on the basis of our prior opinion in *Dixie Fuel.*

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Nos. 00-4080 and 00-4082

BELLAIRE CORPORATION; NACCO INDUSTRIES, INC.; NORTH AMERICAN COAL CORPORATION,
PLAINTIFFS-APPELLEES

v.

LARRY G. MASSANARI, ACTING COMMISSIONER OF SOCIAL SECURITY, DEFENDANT-APPELLANT

MICHAEL H. HOLLAND; WILLIAM P. HOBGOOD; MARTY D. HUDSON; THOMAS O.S. RAND; ELLIOT A. SEGAL; CARL E. VAN HORN; GAIL R. WILENSKY, TRUSTEES OF THE UNITED MINE WORKERS OF AMERICA COMBINED BENEFIT FUND, INTERVENING DEFENDANTS

On Appeal from the United States District Court for the Southern District of Ohio

---

Filed: June 22, 2001

MEMORANDUM OPINION

Before: MARTIN, Chief Judge; NORRIS, Circuit Judge; and QUIST, District Judge.*

---

* The Honorable Gordon J. Quist, United States District Judge for the Western District of Michigan, sitting by designation.

PER CURIAM. The sole issue before us upon appeal is whether the Commissioner of Social Security had authority under the Coal Industry Retiree Health Benefit Act of 1992, 26 U.S.C. § 9701 *et seq.* ("Coal Act"), to make initial assignments of beneficiaries to coal operators after October 1, 1993. This court has already held that the Commissioner lacks such authority. *See Dixie Fuel Co.* v. *Comm'r of Soc. Sec.*, 171 F.3d 1052 (6th Cir. 1999).

Recognizing that *Dixie Fuel* controls our disposition of this case, the government explicitly (and the trustees implicitly) concedes that this panel must affirm the district court's decision to declare all initial assignments made after October 1, 1993, null and void. We agree. "[A] subsequent panel of this circuit court is powerless to revisit, modify, amend, abrogate, supersede, set aside, vacate, avoid, nullify, rescind, overrule, or reverse any prior Sixth Circuit panel's published precedential ruling of law." *United States* v. *Dunlap*, 209 F.3d 472, 481 (6th Cir. 2000); *see also* 6th Cir. R. 206(c) ("Court en banc consideration is required to overrule a published opinion of the court."). Our decision in *Dixie Fuel* thus controls until and unless "an inconsistent decision of the United States Supreme Court requires modification of the decision or this Court sitting en banc overrules the prior decision." *United States* v. *Smith*, 73 F.3d 1414, 1418 (6th Cir. 1996) (quoting *Salmi* v. *Sec'y of Health and Human Servs.*, 774 F.2d 685, 689 (6th Cir. 1985)).

We therefore **affirm** the district court's grant of partial summary judgment to the plaintiffs on the basis of our prior opinion in *Dixie Fuel*.

APPENDIX C

UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF KENTUCKY
OWENSBORO DIVISION

Civil Action No. 4:99CV-201-M

PEABODY COAL COMPANY, ET AL., PLAINTIFFS

v.

KENNETH S. APFEL, COMMISSIONER OF SOCIAL SECURITY, DEFENDANTS

[Entered: July 11, 2000]

FINAL JUDGMENT

The Defendant's Motion for Entry of Judgment pursuant to Rule 58 is hereby granted. [DN 19] Therefore, a final judgment is hereby entered consistent with the terms of the Orders previously entered herein on February 8, 2000 [DN8], March 14, 2000 [DN 15], and April 13, 2000 [DN 18], which Orders dispose of all the issues in this case.

THIS IS A FINAL AND APPEALABLE ORDER AND THERE IS NO JUST CAUSE FOR DELAY.

This 11th day of July, 2000.

/s/ JOSEPH H. MCKINLEY, JR.
JOSEPH H. MCKINLEY, JR.
Judge, United States District Court

cc: counsel of record

APPENDIX D

UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF KENTUCKY
AT OWENSBORO

Civil Action No. 4:99CV-201-M

PEABODY COAL COMPANY, ET AL., PLAINTIFFS

v.

KENNETH S. APFEL, COMMISSIONER SOCIAL SECURITY ADMINISTRATION, DEFENDANT

[Entered: Apr. 13, 2000]

ORDER

Plaintiffs' filing of the Complaint having caused Social Security Administration to expend considerable resources in investigating the factual bases of Count VI and in responding to the claims in Count VI, and this Court finding that dismissal would prejudice the defendant,

IT IS ORDERED that Plaintiffs motion to dismiss Count VI without prejudice is denied and that Count VI is hereby dismissed WITH PREJUDICE.

Date: 4/13/2000

/s/ JOSEPH H. MCKINLEY
JOSEPH H. MCKINLEY,
United States District Court
Judge

cc: counsel of record

APPENDIX E

UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF KENTUCKY
AT OWENSBORO

Civil Action No. 4:99CV-201(M)

PEABODY COAL COMPANY, ET AL., PLAINTIFFS

v.

KENNETH S. APFEL, COMMISSIONER OF SOCIAL SECURITY, DEFENDANT

[Entered: Mar. 14, 2000]

ORDER

Upon consideration of the Plaintiffs' Motion for Partial Summary Judgement on Counts IV and V, and Defendant's opposition thereto, and the entire record in this matter, it is hereby ORDERED that the Plaintiffs' Motion for Partial Summary Judgment is GRANTED and DECLARED that all *initial* assignments the Commissioner of Social Security made to Peabody Coal Company and Eastern Associated Coal Corp. after September 30, 1993 are null and void.

It is further ORDERED that the Commissioner is enjoined from making any *initial* assignments to Peabody Coal Company and Eastern Associated Coal Corp. in the future; and ORDERED that the Commissioner shall notify the UMWA Combined Benefit Fund within 45 days of the entry of this Order of the identity of each beneficiary assignment to Peabody Coal Com-

pany and Eastern Associated Coal Corp. from the Social Security Administration subject to this Order, and inform the Combined Fund that said assignments are void and have been withdrawn.

Dated: 3-14-2000 /s/ JOSEPH S. MCKINLEY
JOSEPH S. MCKINLEY
United States District Judge

APPENDIX F

UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF KENTUCKY
AT OWENSBORO

C.A. #4:99CV-201(M)

PEABODY COAL COMPANY, ET AL., PLAINTIFFS

v.

KENNETH S. APFEL, COMMISSIONER SOCIAL SECURITY,
DEFENDANT

[Filed: Feb. 8, 2000]

STIPULATION OF DISMISSAL WITHOUT PREJUDICE

Pursuant to Rule 41(a)(1)(ii) of the Federal Rules of Civil Procedure, it is hereby stipulated and agreed to by and between the respective parties that Counts I - III of Plaintiffs' Complaint in the above-captioned case be dismissed without prejudice, each party to bear their own costs, and that the Court may enter an Order accordingly, notice by the Clerk being hereby waived.

So stipulated.

COUNSEL FOR PLAINTIFFS

/s/ JOHN R. WOODRUM
John R. Woodrum
W. Gregory Mott
Heenan, Althen & Roles
1110 Vermont Avenue, N.W.
Ste. 400
Washington, D.C. 20005-3593
Telephone: (202) 887-0800

Gross Lindsay
Trimble, Lindsay & Shea
P.O. Box 19
Henderson, KY 42419-0019
Telephone: (270) 827-9824

COUNSEL FOR DEFENDANT

/s/ BENJAMIN P. COOPER
Richard Lepley
Benjamin P. Cooper
Federal Programs Branch
Civil Division
Department of Justice
901 E Street, N.W.,
Room 946
Washington, D.C. 20004
Telephone: (202) 514-1285

David W. Ogden
Assistant Attorney General

Steven S. Reed
United States Attorney
John E. Kuhn, Jr.
Western District of
Kentucky
510 West Broadway,
10th Floor
Louisville, KY 40202

Frieda Schlemeyer Colfelt
Office of the General
Counsel
Social Security
Administration
Altmeyer Building
6401 Security Boulevard
Baltimore, MD 21235

ORDER

AND NOW, to wit, this 8th day of February 2000, it is so ORDERED.

/s/ JOSEPH H. MCKINLEY
JOSEPH H. MCKINLEY
UNITED STATES
DISTRICT JUDGE

cc: Counsel of Record

APPENDIX G

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO

Case No. C2-99-532

BELLAIRE CORP., ET AL.

vs.

KENNETH S. APFEL, COMMISSIONER OF SOCIAL SECURITY, ET AL.

[Filed: June 30, 2000]

JUDGMENT IN A CIVIL CASE

[ ] Jury Verdict. This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

[ ] Decision by Court. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

[X] Decision by Court. This action was decided by the Court without a trial or hearing.

IT IS ORDERED AND ADJUDGED that pursuant to the Opinion and Order of June 30, 2000, the Bellaire Group's motions for partial summary judgment are GRANTED as they relate to the 270 beneficiaries named in Count IV of the Complaint. The Court ORDERS the Trustees to credit the accounts of the Bellaire Group for the payments previously made for the 270 beneficiaries at issue in Count IV of the

Complaint. The Court further finds that the Bellaire Group is entitled to injunctive relief as set forth in the Opinion and Order. FINAL JUDGMENT is therefore entered with respect to Count IV of the Complaints in favor of the Bellaire Group.

Date: June 30, 2000 Kenneth J. Murphy, Clerk

/s/ PEG LAMBERT
By PEG LAMBERT/Deputy Clerk

APPENDIX H

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

Case No. C-2-99-532

BELLAIRE CORP., ET AL., PLAINTIFFS

v.

KENNETH S. APFEL, COMMISSIONER OF SOCIAL SECURITY, ET AL., DEFENDANTS

[Filed: June 30, 2000]

OPINION AND ORDER

This matter is before the Court on the motions for preliminary and permanent injunctive relief, partial summary judgment and the entry of final judgment filed by Plaintiffs Bellaire Corp., NACCO Industries, Inc. and The North American Coal Corp., (the "Bellaire Group"). (Doc. # 14; Doc. # 18.) For the reasons stated below, the Court GRANTS the Bellaire Group's motions.

I. BACKGROUD

The facts of this case are not in dispute. On June 4, 1999, the Bellaire Group filed the instant action against Defendant Kenneth S. Apfel, Commissioner of Social Security. On November 8, 1999, the Trustees of the United Mine Workers of America ("UMWA") Combined Benefit Fund (the "Trustees") filed a motion to intervene in this action as party defendants. (Doc. # 8.)

On April 7, 2000, the Court granted the Trustees' motion to intervene. (Doc. # 15).

In its six-count Complaint, the Bellaire Group seeks review of several final administrative decisions made by the Commissioner which imposed health benefit liability on the Bellaire Group under the Coal Industry Retiree Health Benefit Act of 1992 ("Coal Act"), 26 U.S.C. § 9701 (1992). The instant motions concern only Count IV of the Complaint. In Count IV, the Bellaire Group seeks review of the Commissioner's decision to hold it responsible under the Coal Act for paying the health insurance premiums for certain retired miners and their dependants. In order to better understand the basis for Count IV of the Complaint, the Court now examines the relevant provisions of the Coal Act.

A. The Coal Act

In 1992, Congress enacted the Coal Act in order to create additional financing for the health benefits of retired miners and their dependants. The Act created the UMWA Combined Benefit Fund and made individual mine operators responsible for the health care costs of specific assigned beneficiaries. To that end, the Act directed the Commissioner of Social Security to assign retired miners to the signatory operator or the "related person" who had previously employed them.[1] That operator then became responsible for paying the

---

[1] A "signatory operator" is a coal company that signed any previous coal wage agreement. *See* 26 U.S.C. § 9701(c)(1). A "related person" is a member of a controlled group of corporations that includes the signatory operator, any business under common corporate control with the signatory operator or any other person having a partnership interest with the signatory operator in a coal related business. *See id.* at § 9701(c)(2)(A).

health benefit premiums of those assigned retirees and their dependants. The Act provided that the Commissioner "shall" make the assignments by October 1, 1993. The Act further provided that the health benefit premiums for beneficiaries not assigned to specific operators shall be allocated throughout the coal industry. That is, each operator would be responsible for paying a certain percentage of the health care costs of beneficiaries who were not specifically assigned to an operator.

B. The Instant Dispute

In Count IV of the Complaint, the Bellaire Group asserts that the Coal Act set a statutory deadline of October 1, 1993, after which time the Commissioner could not assign new beneficiaries to the companies. The Bellaire Group asserts that they were wrongfully assigned 270 beneficiaries by Defendants after this deadline.[2] The Bellaire Group argues that they cannot be compelled to pay the premiums for those beneficiaries who were not initially assigned to some signatory operator or related person by the October 1, 1993 deadline.

On April 5, 2000, the Bellaire Group filed the instant motions for a preliminary and permanent injunction,

---

[2] The Bellaire Group originally asserted that the Commissioner wrongfully assigned 273 beneficiaries to them. However, three of those beneficiaries were actually assigned before the October 1, 1993 deadline. Because those three beneficiaries were assigned before the deadline, the parties agreed to dismiss the portion of Count IV that pertains to those beneficiaries. Specifically, the parties agreed to dismiss, with prejudice, the portion of Count IV that pertains to Wallace Gordon, Leland Thomas and Clara Thomas. (Doc. # 23.)

partial summary judgment and the entry of final judgment with respect to Count IV of the Complaint against the Commissioner. (Doc. # 14.) After that motion was filed, this Court granted the Trustees leave to intervene as a party defendant in this action. (Doc. # 15.) The Bellaire Group then filed an identical motion against the Trustees that merely incorporates the law and argument from the first motion. (Doc. # 18.) The Court now considers those motions together.

II. THE MOTIONS FOR PARTIAL SUMMARY JUDGMENT AND INJUNCTIVE RELIEF

A. The Standard of Review

Summary judgment is appropriate only in a limited number of circumstances. Rule 56(c) of the Federal Rules of Civil Procedures provides, in pertinent part, that summary judgment shall be granted only:

> if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.

Fed. R. Civ. P. 56(c). The moving party bears the burden of establishing the absence of a genuine issue as to any material fact. *See Adickes* v. *S.H. Kress & Co.*, 398 U.S. 144, 157 (1970). The Supreme Court held that the standard of summary judgment "mirrors the standard for a directed verdict under Federal Rules of Civil Procedure 50(a), which is that the trial judge must direct a verdict if, under the governing law, there can be but one reasonable conclusion as to the verdict." *Anderson* v. *Liberty Lobby, Inc.*, 477 U.S. 242, 250

(1986). This is true where, for instance, the dispute turns only on a legal question and the moving party must prevail as a matter of law even if the court were to resolve all factual disputes in favor of the non-moving party. *See Ross* v. *Franzen*, 777 F.2d 1216, 1222 (7th Cir. 1985).

In addition, a summary judgment motion requires special treatment of the record. The Court "must view the evidence presented through the prism of the substantive evidentiary burden" and determine "whether reasonable jurors could find by a preponderance of the evidence that the Plaintiff is entitled to a verdict . . . ." *Anderson*, 477 U.S. at 252; *see also Celotex Corp.* v. *Catrett*, 477 U.S. 317, 323 (1986). Nonetheless, in making this determination the Court may not impinge upon the proper function of the jury. Therefore, all of "[t]he evidence of the non-movant is party to be believed, and all justifiable inferences are to be drawn in his favor." *Anderson*, 477 U.S. at 255. The non-moving party does have the burden, however, after completion of sufficient discovery, to submit evidence in support of any material element of a claim or defense on which that party would bear the burden of proof at trial, even if the moving party has not submitted evidence to negate the existence of that material fact. *See Celotex Corp.*, 477 U.S. at 322. It is with these standards in mind that the instant motions for partial summary judgment must be decided.

B. Analysis

Count IV of the Complaint alleges that the Commissioner unlawfully assigned beneficiaries to the Bellaire Group who were not originally assigned to some signatory operator, whether a member of the Bellaire Group or some other entity, after the October 1, 1993 deadline. According to the Bellaire Group, it is paying over $40,000 each month in preminums, and has alread paid over a total of $4.3 million, as a result of the illegal assignments.

In support of its position, the Bellaire Group relies on *Dixie Fuel Co.* v. *Commissioner of Social Security*, 171 P.3d 1052 (6th Cir. 1999). In *Dixie Fuel*, the Sixth Circuit addressed the precise issue raised in this case: whether the Commissioner of Social Security has the authority to make original assignments of Coal Act beneficiaries on or after the October 1, 1993 deadline. In resolving this issue, the Sixth Circuit held that the Commissioner cannot make such assignments. *Id.* at 1064. Specifically, the Sixth Circuit held that "[t]he October 1, 1993 date is a deadline" and the Coal Act "does not permit the SSA to make such assignments after that date." *Id.*

In reaching this decision, the Sixth Circuit began its analysis with the statutory language of § 9706(a) of the Coal Act which provides, in pertinent part:

> [T]he Commissioner of Social Security shall, before October 1, 1993, assign each coal industry retiree who is an eligible beneficiary to a signatory operator. . . .

Id. at 1060 (quoting 26 U.S.C. § 9706(a) (1992)). The Sixth Circuit found the language of this provision to be

"plain on its face" and that the word "shall" is "explicitly mandatory language." *Id.* at 1061. Furthermore, the Sixth Circuit noted as follows:

> No provision of the Coal Act so much as hint that the October 1, 1993 date is not a deadline. To the contrary, the entire statutory scheme for assigning beneficiaries and financing the Combined Benefit Fund reflects Congress's intent that all assignments be completed by October 1, 1993.

Id. According to the Sixth Circuit, those beneficiaries not assigned to a particular coal company by the October 1, 1993 deadline must be placed in the "unassigned pool." *Id.* at 1062. Thus, the health benefit premiums for those beneficiaries must be shared proportionally by all coal companies in the industry. *Id.* at 1055.

In the instant matter, Defendants concede that the Sixth Circuit's decision in *Dixie Fuel* controls the outcome of this case and that under *Dixie Fuel*, the Commissioner unlawfully assigned the Bellaire Group 270 beneficiaries after October 1, 1993. The Commissioner, for example, summarized his position as follows:

> Plaintiffs have moved for summary judgment on Count IV of their Complaint. They note that some initial assignments of retired miners and dependants to plaintiffs under the [Coal Act] were not made until after September 30, 1993. They contend that the holding in *Dixie Fuel* . . . requires the conclusion that any such assignments after September 30, 1993 are void. This appears to be a correct reading of what *Dixie [Fuel]*, if correctly decided, would require.

(Doc. # 17 at 1.) The Trustees agree with the Commissioner that this Court is bound by the decision in *Dixie Fuel*. (Doc. # 20 at 2.) Although Defendants agree that this Court is bound by the decision in *Dixie Fuel*, they assert that the Sixth Circuit incorrectly decided that case. Therefore, Defendants are opposing the instant motions in order "to preserve their right to challenge *Dixie Fuel* in further appellate proceedings." (*Id.* at 2.)

After considering the facts and circumstances of this case, the Court finds that it is bound by the Sixth Circuit's decision in *Dixie Fuel*. Therefore, the Court finds that the 270 initial assignments made by the Commissioner to the Bellaire Group are void as a matter of law. Accordingly, the Court GRANTS the Bellaire Group's motions for partial summary judgment as they relate to the 270 beneficiaries named in Count IV of the Complaint. In granting the Bellaire Group's motions for partial summary judgment, the Court finds that the Bellaire Group is entitled to a credit for all premiums previously paid for these unlawfully assigned beneficiaries. That is, the Court hereby ORDERS the Trustees to credit the accounts of the Bellaire Group for the payments previously made for the 270 beneficiaries at issue in Count IV of the Complaint.

Furthermore, the Court finds that the Bellaire Group is entitled to injunctive relief in this case. In light of this ruling, the Court hereby ENJOINS Defendants from collecting any further premium payments for the 270 beneficiaries initially assigned to the Bellaire Group after October 1, 1993. In addition, the Court also ENJOINS Defendants from assigning any additional previously unassigned beneficiaries to the Bellaire Group. The Court finds that such injunctive relief is

necessary in this instance because the Bellaire Group will suffer irreparable injury in the absence of an injunction and there is no adequate remedy at law to protect the Bellaire Group.

III. THE MOTION FOR THE ENTRY OF FINAL JUDGMENT

In this case, the Bellaire Group moves this Court for the entry of final judgment with respect to Count IV of the Complaint. Specifically, the Bellaire Group contends that there is no just reason to delay the entry of final judgment with respect to Count IV "for the year or more that it will take to resolve the remainder of the case." (Doc. # 38 at 2.) The Court now considers the merits of that motion.

A. The Standard of Review

Pursuant to Rule 54(b), a district court hearing an action involving multiple claims may enter final judgment with respect to some but not all of the claims upon an "express determination that there is no just reason for delay and upon an express direction for the entry of judgment." Fed. R. Civ. Pro. 54(b) (1999). The Rule "is intended to strike a balance between the undesirability of more than one appeal in a single action and the need for making review available in multiple-party or multiple-claim situations at a time that best serves the needs of the litigants." *Day* v. *NLO, Inc.*, 3 F.3d 153, 155 (6th Cir. 1993) (internal quotations omitted).

Rule 54(b) only applies to final judgments. *See Curtiss-Wright Corp.* v. *General Electric Co.*, 446 U.S. 1, 7 (1980). With respect to this requirement, "[i]t must

be a judgment in the sense that it is a decision upon a cognizable claim for relief, and it must be final in the sense that it is an ultimate disposition of an individual claim entered in the course of a multiple claims action." *Id.* (internal citations and quotations omitted). If the court determines that the judgment is *final*, it must then determine whether there is any just reason to delay an appeal of the judgment. *See id.* In making this determination, the court must take into consideration the judicial administrative interests and the equities involved. *See id.* The court must also consider other relevant factors, including (1) whether the claims under review are separable from the other remaining claims; (2) whether an appellate court would have to decide the same issues more than once if there were subsequent appeals; and (3) whether possible delay and expense to the parties weigh against an appeal at the present time. *See id.*; *see also Day*, 3 F.3d at 155.

B. Application to the Instant Matter

In this case, the Court finds that its decision in Section II.B of this Opinion and Order constitutes a final judgment. The Bellaire Group sets forth a cognizable claim for relief in Count IV and this Court's decision granting summary judgment for the Bellaire Group is "an ultimate disposition of an individual claim entered in the course of a multiple claims action." *Curtiss-Wright*, 446 U.S. at 7. That is, this Court's decision with respect to Count IV is final in the sense that is completely resolves that claim and finds that the Bellaire Group is entitled to summary judgment as a matter of law.

In addition, the Court also finds that Count IV of the Complaint is separate and distinct from the other five

claims brought in this action. Count IV "does not overlap factually with any other claims, nor does it involve similar propositions of law." (Doc. # 28 at 2.) To the contrary, Count IV of the Complaint involves "a purely legal question" not raised in any of the other counts of the Complaint. Therefore, because the issues raised in Count IV are unique to that count, it is considerably unlikely that the Sixth Circuit will have to revisit these issues in a future appeal of the remaining claims.

Moreover, the Court finds that there is no just reason to delay the appeal of this Court's decision. The issues raised in Count IV of the Complaint are of great social importance and impact a wide population of retirees and their dependants. Furthermore, any costs that will be incurred due to a separate appeal at this time will be minimal. Thus, the Court finds that an appeal at this time will best serve the interests of justice. Accordingly, the Court GRANTS the Bellaire Group's motion. There is no just reason for delay and the entry of final judgment is appropriate with respect to Count IV of the Complaint.

IV. CONCLUSION

Upon consideration and being duly advised, the Court GRANTS the Bellaire Group's motions for partial summary judgment and injunctive relief with respect to Count IV of the Complaint. In addition, the Court GRANTS the Bellaire Group's motions for the entry of final judgment with respect to that Count of the Complaint. That is, the Court finds that its judgment with respect to Count IV is final and there is no just reason to delay the appeal of this Court's decision.

Accordingly, the Court directs the Clerk of Court to enter final judgment with respect to Count IV of the Complaint.

IT IS SO ORDERED.

/s/ JOSEPH P. KINNEARY
JOSEPH P. KINNEARY
UNITED STATES
DISTRICT JUDGE

APPENDIX I

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Nos. 00-4080, 00-4082 and 00-6239

BELLAIRE CORPORATION, ET AL.; PEABODY COAL COMPANY, ET AL., PLAINTIFFS-APPELEES

v.

KENNETH S. APFEL, COMMISSIONER OF SOCIAL SECURITY, ET AL., DEFENDANT-APPELLANT,

MICHAEL H. HOLLAND, ET AL.
INTERVENING DEFENDANTS

[Filed: Dec. 6, 2000]

ORDER

The court having received two petitions for hearing en banc, and the petitions having been circulated to all active judges of this court, and no judge of this court having favored the suggestion,

It is **ORDERED** that the petitions be and hereby are **DENIED.**

ENTERED BY ORDER OF THE COURT

/s/ LEONARD GREEN
LEONARD GREEN, Clerk

APPENDIX J

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 97-6099

DIXIE FUEL COMPANY, PLAINTIFF-APPELLANT

v.

COMMISSIONER OF SOCIAL SECURITY; DARRELL BLEVINS, SOCIAL SECURITY FREEDOM OF INFORMATION ACT OFFICER; KENNETH S. APFEL, COMMISSIONER, DEFENDANTS-APPELLEES

Argued Sept. 22, 1998
Decided March 25, 1999

Before: WELLFORD, NORRIS, and BATCHELDER, Circuit Judges.

BATCHELDER, Circuit Judge.

Plaintiff Dixie Fuel Company ("Dixie Fuel") appeals from the order of the district court denying its motion for a temporary restraining order, and preliminary and permanent injunctive relief to prevent the Social Security Administration ("SSA") from assigning beneficiaries under the Coal Industry Retirement Health Benefit Act ("Coal Act"), 26 U.S.C.A. §§ 9701-9722 (West Supp. 1998), to Dixie Fuel. For the reasons enumerated below, we find that the district court erred in denying Dixie Fuel's motion for injunctive relief and thus, we reverse.

I. THE COAL ACT

In 1992, Congress enacted the Coal Act in an attempt to create additional financing for the health benefits fund of the United Mine Workers of America ("UMWA"). Under the Coal Act, the Social Security Administration was responsible for "assigning" eligible UMWA retirees and their dependants to current and former signatory coal operators [1] (or "related persons"[2] in accordance with the criteria set forth at 26 U.S.C. § 9706.[3] The statute specifies that "the Commissioner of Social Security shall, before October 1, 1993," make these assignments. 26 U.S.C. § 9706(a).

Those companies which have been assigned beneficiaries by the SSA ("assigned operators") are required to pay premiums for these beneficiaries directly to the UMWA Combined Benefit Fund. 26 U.S.C. § 9704. Beneficiaries not assigned to a signatory operator or

---

[1] A signatory operator is defined by the Act as: "a person which is or was a signatory to a coal wage agreement." 26 U.S.C. § 9701(c)(1).

[2] A related person is defined as:

> (i) a member of the controlled group of corporations . . . ; (ii) a trade or business which is under common control . . . ; or (iii) any other person who is identified as having a partnership interest or joint venture with a signatory operator in a business within the coal industry, but only if such business employed eligible beneficiaries, except that this clause shall not apply to a person whose only interest is as a limited partner.

26 U.S.C. § 9701(c)(2)(A). The SSA assigned beneficiaries to Dixie Fuel as a "related person" to V & C Coal, which was not in business at the time the Act was passed. Although Dixie Fuel contested this determination below, it is not relevant to this appeal.

[3] Essentially, an assignment is made based upon the work history of the miner and the signatory (or related person) and the "in business" status of the miner's employers.

related company go into the "unassigned pool." 26 U.S.C. § 9704(d). After exhaustion of specifically designated funds,[4] the premiums for the miners in the unassigned pool will be assessed proportionally against all assigned operators. 26 U.S.C. § 9704(d).

Under the Coal Act, if an assigned operator believes that it has been assigned beneficiaries in error, it may obtain information about the beneficiaries from the SSA and seek review of the assignment. 26 U.S.C. § 9706(f); *see also* 20 C.F.R. §§ 422.601-607. The burden is on the assigned operator to make out a prima facie case that the assignments were in error. *See* 20 C.F.R. § 422.605. The Commissioner then reviews the assignments; if he determines that the assignments were in error, he has the authority to declare them void and to

---

[4] At the Coal Act Hearing in 1995, the Acting SSA Commissioner described the funding sources:

> The Coal Act provides for financial stability of the Combined Benefit Fund by drawing from three constituent sources. First, the beneficiaries themselves were required to participate by the transfer of $210 million from the 1950 Pension Trust in three installments of $70 million in each of the first three plan years. This has been enough to cover the cost of providing benefits to the "unassigned" or orphan beneficiaries in the Combined Fund during these years. (For an additional ten years, transfers from the Abandoned Mine Reclamation Fund are expected to continue to cover this unassigned beneficiary cost).

Coal Industry Retiree Health Benefit Act of 1992: Hearing on S. 103-59 Before the House Subcomm. on Oversight of the Comm. on Ways and Means, 104th Cong. (1995) [hereinafter *1995 Coal Act Hearing*] (Statement of Acting SSA Comm'r, Lawrence H. Thompson). Currently, assigned operators have not been assessed any unassigned beneficiary premiums because the other two sources have been sufficient to provide benefits. *Id.* (Testimony of UMWA Combined Fund Executive Dir. Russell U. Crosby).

reassign the beneficiaries to the appropriate signatory operator or related entity. 26 U.S.C. § 9706(f)(3)(A). If he determines that the assignments are not in error, he must notify the assigned operator. The Commissioner's determination is final. 26 U.S.C. § 9706(f)(3)(B), (f)(4).

II. DIXIE FUEL COMPANY & PROCEDURAL HISTORY

Plaintiff-Appellant Dixie Fuel was never a signatory to the UMWA labor agreements referenced in the Act. However, the SSA has deemed Dixie Fuel to be a related company to the V & C Coal Company ("V & C"), a signatory which is no longer in existence. Since September 1995, the SSA has assigned Dixie Fuel more than fifty beneficiaries who were former employees of V & C and maintains that Dixie Fuel is responsible for these beneficiaries. Dixie Fuel has estimated its current liability based on these assignments at approximately $500,000.00, exclusive of interest and penalties. Almost all of the beneficiaries assigned to Dixie Fuel came from the "unassigned pool." [5]

Dixie Fuel sought SSA review of the assignments, and has made requests under the Freedom of Information Act ("FOIA") to gain information in support of its request. In order to submit further information in support of its challenge to these assignments, Dixie Fuel has requested extensions of time in the review process.

On July 30, 1997, Dixie Fuel filed a Verified Claim in the district court for the Eastern District of Kentucky seeking declaratory and injunctive relief voiding these

[5] Dixie Fuel's challenge to the assignment to it of beneficiaries initially assigned to another assigned operator is not the subject of this appeal.

assignments. Contemporaneously, Dixie Fuel filed a motion for a temporary restraining order enjoining the SSA from assigning it any more beneficiaries, requiring the SSA to notify the Combined Fund that assignments to Dixie Fuel are void, and enjoining the SSA from withholding information requested by Dixie Fuel in its FOIA requests. The district court denied all injunctive relief to Dixie Fuel,[6] ruling solely that the agency's interpretation of § 9706(a) as allowing the SSA to assign beneficiaries from the unassigned pool after October 1, 1993, is reasonable and entitled to deference. Dixie Fuel now brings this interlocutory appeal pursuant to 28 U.S.C. § 1292(a)(1) from the district court's denial of its motion for injunctive relief.

At oral argument, the SSA conceded that the particular assignments at issue are void under the Supreme Court's decision in *Eastern Enterprises v. Apfel*, 524 U.S. 498, 118 S. Ct. 2131, 141 L.Ed.2d 451 (June 25, 1998). The SSA argued that this concession moots the issue before this Court.

[6] The district court entertained oral argument on Dixie Fuel's motion for a temporary restraining order, after which, at the court's request, the parties filed additional briefs on the issue of whether the October 1, 1993, date in 26 U.S.C. § 9706(a) was the deadline for assigning of beneficiaries. Although the district court's subsequent order states that "plaintiff's motion for a temporary restraining order, preliminary and permanent injunction is denied," the order also states that "[a]t this point in time the court cannot find that the plaintiff will succeed on the merits of its case," and that "injunctive relief is not appropriate at this time."

III. DISCUSSION

We will first address whether the SSA's concession at oral argument moots this appeal. Second, we will address the district court's jurisdiction over the issues below. Finally, we will consider the denial of injunctive relief.

A. MOOTNESS

The SSA's concession at oral argument did not render this appeal moot. A party's voluntary cessation of an allegedly illegal activity does not moot the issue of whether prospective injunctive or declaratory relief is proper. *City of Mesquite v. Aladdin's Castle, Inc.*, 455 U.S. 283, 289, 102 S. Ct. 1070, 71 L.Ed.2d 152 (1982); *Atlantic Richfield Co. v. United States*, 774 F.2d 1193, 1198 (D.C. Cir. 1985) (holding that even when an administrative agency ceases illegal conduct, the case is not moot); *Blinder, Robinson & Co. v. United States Sec. & Exch. Comm'n*, 692 F.2d 102, 106-07 (10th Cir. 1982) (same); *Hooker Chem. Co., Ruco Div. v. United States EPA*, 642 F.2d 48, 52 (3d Cir. 1981). However, "[s]uch abandonment is an important factor bearing on the question whether a court should exercise its power to enjoin the defendant from renewing the practice, but that is a matter relating to the exercise rather than the existence of judicial power." *City of Mesquite*, 455 U.S. at 289, 102 S. Ct. 1070.

Equally importantly, *Eastern Enterprises* did not address the issue that Dixie Fuel asks us to decide here. *Eastern Enterprises* held that the Coal Act's retroactive allocation of beneficiaries, as applied to Eastern, violates the Takings Clause of the Fifth Amendment. *Eastern Enterprises*, 118 S. Ct. at 2153.

Dixie Fuel seeks not only to void the assignments already made to it, but to enjoin the SSA from making any new assignments, not because such assignments might violate the Fifth Amendment, but because the Coal Act does not permit the SSA to make any assignments at all after October 1, 1993.[7] The defendant who seeks to have a case dismissed as moot must demonstrate that "there is no reasonable expectation that the alleged wrongs will be repeated," *Blinder, Robinson & Co.*, 692 F.2d at 106-07 (*citing United States v. W.T. Grant Co.*, 345 U.S. 629, 73 S. Ct. 894, 97 L.Ed. 1303 (1953)). Although the SSA conceded that these particular assignments to Dixie Fuel were void under *Eastern Enterprises*, it did not concede that it may not or would not again assign beneficiaries to Dixie Fuel. Therefore, the case is not moot and we may reach the merits of the appeal.

B. DISTRICT COURT'S JURISDICTION

Dixie Fuel asserts that the district court had jurisdiction under 28 U.S.C. § 1331 (federal question jurisdiction) and 5 U.S.C. §§ 552 & 702 (the Administrative Procedure Act). The SSA contends that the lower court lacked subject matter jurisdiction because Dixie Fuel has not sought a final decision by the SSA and has therefore failed to exhaust its administrative remedies. The court below did not address the challenge to its jurisdiction.

---

[7] As we shall discuss more fully later in this opinion, the statute actually says that the assignments shall be made "before October 1, 1993." 26 U.S.C. § 9706(a). This would mean, of course, that no assignments could be made after September 30, 1993. Solely in order to avoid confusion, we will use the October 1, 1993, designation throughout this opinion.

1. Jurisdictional Bases

The district court has jurisdiction under 28 U.S.C. § 1331 to review agency actions, subject only to statutes precluding such review, *see Califano v. Sanders*, 430 U.S. 99, 105, 97 S. Ct. 980, 51 L.Ed.2d 192 (1977). The Administrative Procedure Act (APA), is not an independent grant of jurisdiction, *see id.* at 107, 97 S. Ct. 980; rather, it provides the framework for judicial review of agency actions.[8] Indeed, the Supreme Court has explained that the APA "'embodies the basic presumption of judicial review'" available to those aggrieved by agency action. *Reno v. Catholic Social Servs., Inc.*, 509 U.S. 43, 56-57, 113 S. Ct. 2485, 125 L.Ed.2d 38 (1993) (quoting *Abbott Lab. v. Gardner*, 387 U.S. 136, 140, 87 S. Ct. 1507, 18 L.Ed.2d 681 (1967)).

Although 28 U.S.C. § 1331 provides the statutory basis for jurisdiction, Dixie Fuel still must demonstrate that its claims are ripe for adjudication and, if appropriate, that it has exhausted its administrative remedies.

2. Ripeness

The district court is limited by Article III, § 2 of the U.S. Constitution to the adjudication of actual cases or controversies. Thus, the exercise of jurisdiction requires that the case be ripe for review. The ripeness

---

[8] *See* 5 U.S.C. § 701(a), which provides "[t]his chapter applies, according to the provisions thereof, except to the extent that—(1) statutes preclude judicial review; or (2) agency action is committed to agency discretion by law;" and 5 U.S.C. § 702, which in pertinent part provides "[a] person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof."

doctrine exists to ensure that courts decide "only existing, substantial controversies, not hypothetical questions or possibilities." *City Communications, Inc. v. City of Detroit*, 888 F.2d 1081, 1089 (6th Cir. 1989).

Under the APA, "[a]gency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review." 5 U.S.C. § 704. Even in the absence of final agency action, a case may be considered ripe when there is no compelling judicial interest in deferring review. The court should consider whether the issues are fit for judicial decision as well as the hardship to the challenging party resulting from potential delay in obtaining judicial decision. *Thomas v. Union Carbide Agric. Prods. Co.*, 473 U.S. 568, 581, 105 S. Ct. 3325, 87 L.Ed.2d 409 (1985); *Abbott Lab.*, 387 U.S. at 149, 87 S. Ct. 1507, *overruled on other grounds, Califano v. Sanders*, 430 U.S. 99, 97 S. Ct. 980, 51 L.Ed.2d 192 (1977); *see also Mississippi Valley Gas Co. v. Federal Energy Regulatory Comm'n*, 68 F.3d 503, 508 (D.C. Cir. 1995).

"Under the fitness prong . . . , we are to consider the nature of the challenged issue and inquire whether the agency action is sufficiently final for review. . . . When a petitioner 'raises a purely legal question,' we assume that issue is suitable for judicial review." *Mississippi Valley Gas Co.*, 68 F.3d at 508 (citations omitted); *see also Thomas*, 473 U.S. at 581, 105 S. Ct. 3325 ("The issue presented in this case is purely legal, and will not be clarified by further factual development.")

The Coal Act provides that challenged assignment decisions become final after review by the Commissioner of Social Security and notice to the assigned

operator of the Commissioner's determination. 26 U.S.C. § 9706(f)(4). However, one court notes that "[t]he Secretary's decision to assign beneficiaries to [a signatory or related person] pursuant to the Coal Act is a final agency decision and hence, reviewable under the APA." *Bellaire Corp. v. Shalala*, 995 F. Supp. 125, 145 (D.D.C.1997). We recognize that Dixie Fuel filed this action before the review by the Commissioner was complete. However, whether the SSA has the statutory power to assign beneficiaries after October 1, 1993, is a "purely legal question" on which the Commissioner has taken a clearly defined position; there is no indication that the SSA intends to reconsider this question of law in any further administrative action. To require Dixie Fuel to obtain a final agency decision under these circumstances would impose substantial hardship, since Dixie Fuel must either continue to pay the premiums attributable to the challenged assignments or incur the penalties for failure to make those payments. 26 U.S.C. §§ 9706(f)(5), 9707. In this case, as in *Thomas*, "[n]othing would be gained by postponing a decision." *Thomas*, 473 U.S. at 582, 105 S. Ct. 3325. We hold that the Commissioner's decisions assigning beneficiaries to Dixie Fuel are judicially reviewable under the APA.

3. Exhaustion of Administrative Remedies

The Commissioner contends that even if the assignments of beneficiaries to Dixie Fuel are considered final decisions under the APA, the federal court lacks jurisdiction over this matter because Dixie Fuel has not exhausted the administrative remedies provided in § 9706(f). Dixie Fuel counters that its challenge is to the purely legal issue of the Commissioner's statutory authority to make assignments after October 1, 1993, and, in any event, the Coal Act does not contain a

comprehensive review process sufficient to permit Dixie Fuel to obtain a genuine review of this legal issue.

Under the doctrine of exhaustion of administrative remedies, a party is not entitled to judicial relief for an actual or threatened injury until the requisite administrative remedies have been exhausted. *See, e.g., McKart v. United States*, 395 U.S. 185, 193, 89 S. Ct. 1657, 23 L.Ed.2d 194 (1969) (citing *Myers v. Bethlehem Shipbuilding Corp.*, 303 U.S. 41, 50-51, 58 S. Ct. 459, 82 L.Ed. 638 (1938)). However, the Supreme Court has long held that, at least in non-APA cases, the exhaustion requirement is far from absolute. "Of 'paramount importance' to any exhaustion inquiry is congressional intent. Where Congress specifically mandates, exhaustion is required. But where Congress has not clearly required exhaustion, sound judicial discretion governs." *McCarthy v. Madigan*, 503 U.S. 140, 144, 112 S. Ct. 1081, 117 L.Ed.2d 291 (1992) (internal citations omitted).

It was not until *Darby v. Cisneros*, 509 U.S. 137, 144-54, 113 S. Ct. 2539, 125 L.Ed.2d 113 (1993) that the Supreme Court addressed the issue of whether a litigant who seeks judicial review of agency action under the APA must first exhaust all administrative remedies. In *Darby*, the Court held that in actions brought under the APA, the courts lack discretion to require exhaustion unless it is "expressly required by statute or when an agency rule requires appeal before review and the administrative action is made inoperative pending that review." *Id.* at 154, 113 S. Ct. 2539. The Court pointed out that "[a]lthough § 10(a) [5 U.S.C. § 702] provides the general right to judicial review of agency

actions under the APA, § 10(c) [5 U.S.C. § 704][9] establishes when such review is available." *Id.* at 146, 113 S. Ct. 2539. "While federal courts may be free to apply, where appropriate, other prudential doctrines of judicial administration to limit the scope and timing of judicial review, § 10(c), by its very terms, has limited the availability of the doctrine of exhaustion of administrative remedies to that which the statute or rule clearly mandates." *Id.* Darby also made the point that "the judicial doctrine of exhaustion of administrative remedies is conceptually distinct from the doctrine of finality," *id.* at 144, 113 S. Ct. 2539.

> [T]he finality requirement is concerned with whether the initial decisionmaker has arrived at a definitive position on the issue that inflicts an actual, concrete injury; the exhaustion requirement generally refers to administrative and judicial procedures by which an injured party may seek review of an adverse decision and obtain a remedy if the decision is found to be unlawful or otherwise inappropriate.

Id. (citation omitted).

The Coal Act does not specifically require exhaustion of remedies before judicial review. *See* 26 U.S.C. § 9706(f)(2). At most, the Act provides an avenue that an assigned operator may take to obtain review of the factual basis for the assignment of particular beneficiaries. The regulations promulgated to implement the

[9] Section 704 provides, in pertinent part: "Except as otherwise expressly required by statute, agency action otherwise final is final for the purposes of this section whether or not there has been presented or determined an application for a declaratory order, for any form of reconsideration, or, unless the agency otherwise requires by rule and provides that the action meanwhile is inoperative, for an appeal to superior agency authority."

Coal Act similarly contain no mandate of exhaustion of remedies before an aggrieved assigned operator may seek judicial review of the assignment of beneficiaries. The Act does specifically require that "an assigned operator pay the premiums [for its assigned beneficiaries] pending review by the Commissioner of Social Security or by a court under this subsection." 26 U.S.C. § 9706(f)(5).

We have already held that the decision of the Commissioner assigning these beneficiaries to Dixie Fuel was a final decision. We hold further that because this action was brought under the APA, and because the Coal Act and its attendant regulations do not mandate exhaustion of remedies and do not provide that the Commissioner's decision is "inoperative" pending appeal, the district court did not have discretion to require Dixie Fuel to exhaust its administrative remedies before pursuing this action.

Accordingly, we hold that the district court's exercise of jurisdiction in this action was proper.

C. DENIAL OF INJUNCTIVE RELIEF

In deciding whether to grant a preliminary injunction, a district court considers four factors: (1) the plaintiff's likelihood of success on the merits; (2) whether the plaintiff may suffer irreparable harm absent the injunction; (3) whether granting the injunction will cause substantial harm to others; and (4) the impact of an injunction upon the public interest. *Connection Distrib. Co. v. Reno*, 154 F.3d 281, 288 (6th Cir. 1998) (citing *Golden v. Kelsey-Hayes Co.*, 73 F.3d 648, 653 (6th Cir. 1996)). "A district court is required to make specific findings concerning each of the four factors, unless fewer are dispositive of the issue." *Inter-*

national Longshoremen's Ass'n, Local 1937 v. Norfolk Southern Corp., 927 F.2d 900, 903 (6th Cir. 1991).

Ordinarily, the scope of our review of a district court's denial of a preliminary injunction is limited to determining whether that court abused its discretion in finding that the plaintiff likely would not prevail on the merits and in finding insufficient harm to the plaintiff and harm to the defendant and to the public interest. *Thornburgh v. American College of Obstetricians & Gynecologists*, 476 U.S. 747, 106 S. Ct. 2169, 90 L.Ed.2d 779 (1986). We will reverse the district court only if we find that it "relied upon clearly erroneous findings of fact, improperly applied the governing law, or used an erroneous legal standard," *Connection Distrib. Co.*, 154 F.3d at 288, and we review the district court's conclusions of law *de novo* and findings of fact for clear error, *Golden*, 73 F.3d at 653.

The Supreme Court, however, has held that this approach, although it is the norm, is not absolute. *Thornburgh*, 476 U.S. at 756-57, 106 S. Ct. 2169. In that case, the Court explained that "if a district court's ruling rests solely on a premise as to the applicable rule of law, and the facts are established or of no controlling relevance, that ruling may be reviewed even though the appeal is from the entry of a preliminary injunction." *Id.* at 757, 106 S. Ct. 2169. The Court went on to approve the Court of Appeals' plenary review as to the applicable law, holding "[t]hat a court of appeals ordinarily will limit its review in a case of this kind to abuse of discretion is a rule of orderly judicial administration, not a limit on judicial power." *Id.*

This circuit, in *United States v. State of Michigan*, 940 F.2d 143 (6th Cir. 1991) has addressed this issue as well:

> This court has also recognized the scope of appellate jurisdiction over issues involving injunctive relief:
>
> It is elementary that an appeal from the denial of injunctive relief brings the whole record before the appellate court and that the "scope of review may extend further [than the immediate question on which the District Court ruled] to allow disposition of all matters appropriately raised by the record, including entry of final judgment."

Id. at 151-52 (alterations in original) (citations omitted).

In the case before us, the issue is the purely legal question of whether the statute permits the SSA to make any assignments after October 1, 1993. If the statute does not, then Dixie Fuel is entitled, not only to a preliminary injunction, but a permanent one, at least with regard to any initial assignments of beneficiaries to Dixie Fuel after that date. Accordingly, we will proceed with plenary review of this issue.

The statute at issue reads, in pertinent part: "For purposes of this chapter, the Commissioner of Social Security *shall, before October 1, 1993*, assign each coal industry retiree who is an eligible beneficiary to a signatory operator. . . ." 26 U.S.C. § 9706(a) (emphasis added).

The SSA has made two arguments over the course of this action justifying its assignment of beneficiaries to Dixie Fuel after October 1, 1993. First, SSA claimed in its Response to the Plaintiff's Motion for a Temporary Restraining Order, that unassigned beneficiaries are considered "assigned" to the unassigned pool under the meaning of the Act; thus, any assignments to Dixie Fuel after the October 1, 1993, date were actually

"reassignments" under the Act. Dixie Fuel admits that the SSA has statutory authority under 26 U.S.C. § 9706(f)(3)(A)(ii) to make reassignments after October 1, 1993. This argument is unsupported by the SSA's own regulations: "Assignment means our selection of the coal operator or related person to be charged with the responsibility of paying the annual health and death benefit premiums of certain coal miners and their eligible family members." 20 C.F.R. § 422.602. Clearly, no such selection occurs when the beneficiary remains "unassigned." Apparently, however, the SSA abandoned this argument in its Supplemental Memorandum to the district court and in its brief to this Court, in which the SSA admits: "The 'unassigned pool,' by its name alone, demonstrates that its members have *not been assigned*." Appellee's Br. at 15 n. 2 (emphasis added).

The second argument, while not mentioned in the original Response to Dixie Fuel's Motion for a T.R.O., was set forth in the Supplemental Memorandum to the district court as well as in the SSA's brief to this Court. The SSA argues that the October 1, 1993 date contained in the statute is not a jurisdictional mandate, but merely a direction to "spur the SSA into prompt action." Dixie Fuel, of course, asserts that the language of the statute, the legislative history, and congressional intent reflect that the date in the statute was meant to be and has been understood as a mandate terminating the SSA's authority to assign beneficiaries.

The district court concluded, *inter alia*: (1) the interpretation of a statute by the agency charged with executing provisions of the statute is entitled to deference; (2) a statutory direction to an agency to carry out action within a fixed time does not limit the authority of

the agency after that time absent express language; and (3) the agency's power to assign these miners to Dixie Fuel is consistent with congressional intent. The district court did not consider whether the language of the statute plainly evidenced congressional intent, a prerequisite to deciding whether an agency's interpretation should be accorded deference. *See Chevron v. National Resources Defense Council, Inc.*, 467 U.S. 837, 842-43, 104 S. Ct. 2778, 81 L.Ed.2d 694 (1984).

When reviewing an agency's construction of a statute that the agency is empowered to administer, this court must ask the *Chevron* questions: First, has Congress spoken directly to the precise issue? If Congress has directly spoken, then we must give effect to the unambiguously expressed intent of Congress. However, if the statute is silent or ambiguous on the issue, then is the agency's interpretation a permissible construction of the statute? *Id.*

The language of 26 U.S.C. § 9706(a) is plain on its face: "The Commissioner of Social Security *shall, before October 1, 1993*, assign each coal industry retiree . . . to a signatory operator which (or any related person with respect to which) remains in business. . . ." The Supreme Court has held in any number of contexts that "shall" is "explicitly mandatory" language. *See, e.g., United States v. Monsanto*, 491 U.S. 600, 607, 109 S. Ct. 2657, 105 L.Ed.2d 512 (1989) ("Congress could not have chosen stronger words [than 'shall order forfeiture'] to express its intent that forfeiture be mandatory. . . ."); *Societe Nationale Industrielle Aerospatiale v. United States District Court for the Southern District of Iowa*, 482 U.S. 522, 534 n. 15, 107 S. Ct. 2542, 96 L.Ed.2d 461 (1987) (contrasting omission of mandatory language in preamble of Hague Conference on Private International

Law with use of mandatory language ("The present Convention shall apply . . .") in preamble of Hague Service Convention); *Hewitt v. Helms*, 459 U.S. 460, 471, 103 S. Ct. 864, 74 L.Ed.2d 675 (1983) ("[The Commonwealth] has used language of an unmistakably mandatory character, requiring that certain procedures 'shall,' 'will,' or 'must' be employed" with regard to placing inmate in administrative segregation.), *abandoned on other grounds*, *Sandin v. Conner*, 515 U.S. 472, 115 S. Ct. 2293, 132 L.Ed.2d 418 (1995); *Anderson v. Yungkau*, 329 U.S. 482, 485, 67 S. Ct. 428, 91 L.Ed. 436 (1947) ("The word 'shall' is ordinarily 'The language of command.'") However, the Court has also held that "the mere use of the word 'shall' . . . standing alone" was not sufficient to terminate the power of the Secretary of Labor to recover misused funds after the expiration of the statutory period within which the Secretary was to act. *Brock v. Pierce County*, 476 U.S. 253, 262, 106 S. Ct. 1834, 90 L.Ed.2d 248 (1986).[10]

---

[10] *Pierce County* involved a provision in the Comprehensive Employment and Training Act ("CETA"), an act which required qualified entities receiving federal grants for job training programs to comply with the statute and regulations enacted thereunder. *Pierce County*, 476 U.S. at 255, 106 S. Ct. 1834. CETA provided that the Secretary of Labor was to investigate whenever he has reason to believe that a grant recipient was misusing grant funds, and further provided that the Secretary "shall" determine "the truth of the allegation or belief involved, not later than 120 days after receiving the complaint." *Id.* at 255-56, 106 S. Ct. 1834.

The Secretary withheld a portion of Pierce County's grant funds after the 120 days had expired and Pierce County challenged the Secretary's authority to do so, arguing that the statute divested the Secretary of authority after the specified time period. *Id.* at 256-57, 106 S. Ct. 1834. The Supreme Court found that use of the word "shall," standing alone and in the face of a contrary indication from the rest of the statute, was insufficient to remove the Secretary's power to act after 120 days. *Id.* at 262, 106 S. Ct. 1834.

The use of the word "shall" in 26 U.S.C. § 9706(a) is not a "mere use . . . standing alone." *Id.* No provision of the Coal Act so much as hints that the October 1, 1993, date is not a deadline. To the contrary, the entire statutory scheme for assigning beneficiaries and financing the Combined Benefit Fund reflects Congress's intent that all assignments be completed by October 1, 1993. It is not necessary to engage in an exhaustive analysis of the Coal Act to illustrate this point. A look at the interaction of only a few sections is more than sufficient.

"Assigned operator" is defined in § 9701(c)(5): "The term 'assigned operator' means, with respect to an eligible beneficiary defined in section 9703(f), the signatory operator to which liability under subchapter B with respect to the beneficiary is assigned under section 9706." Definitionally, then, there are no "assigned operators" until beneficiaries have been assigned under § 9706.

The liability of assigned operators is set out in § 9704. Under § 9704(a), the liability of assigned operators for payment of annual premiums is based in part on the "unassigned beneficiaries premium" for which that assigned operator is determined to be responsible under § 9704(d).

The "unassigned beneficiaries premium" for which an assigned operator is liable for any plan year, as set out in § 9704(d), is "equal to the applicable percentage of the product of the per beneficiary premium for the plan year multiplied by the number of eligible beneficiaries

who are not assigned under section 9706 to any person for such plan year."

"Applicable percentage," for purposes of determining the liability of assigned operators, is defined in § 9704(f)(1) to mean "with respect to any assigned operator, the percentage determined by dividing the number of eligible beneficiaries assigned under section 9706 to such operator by the total number of eligible beneficiaries assigned under section 9706 to all such operators (determined on the basis of assignments as of October 1, 1993)."

The "applicable percentage" for any assigned operator is subject to annual adjustments for plan years beginning after October 1, 1994. Those adjustments are set out in § 9704(f)(2):

> In the case of any plan year beginning on or after October 1, 1994, the applicable percentage for any assigned operator shall be redetermined under [§ 9704(f)(1)] by making the following changes to the assignments as of October 1, 1993:
>
> > (A) Such assignments shall be modified to reflect any changes during the period beginning October 1, 1993, and ending on the last day of the preceding plan year pursuant to the appeals process under section 9706(f).
> >
> > (B) The total number of assigned eligible beneficiaries shall be reduced by the eligible beneficiaries of assigned operators which (and all related persons with respect to which) had ceased business (within the meaning of section 9701(c)(6)) during the period described in subparagraph (A).

In short, the calculation of the obligation of every assigned operator for payment of unassigned beneficiary premiums is dependent upon the completion of the assignment of beneficiaries by October 1, 1993. Furthermore, the statute expressly provides for making adjustments beyond that date, but those adjustments are all premised on the assignments' having been completed before October 1, 1993. This statutory scheme simply is not comparable to that addressed by the Court in *Brock v. Pierce County*.

Neither does the Coal Act present the kind of situation that concerned the Court in *Pierce County*, namely, a lack of consequences resulting from the agency's failure to act within the timeframe of the statute. *See Pierce County*, 476 U.S. at 259-60, 106 S. Ct. 1834. Despite the Commissioner's best efforts to make the case that if the October 1, 1993, date is held to be a deadline, there is no consequence contained within the statute for the Commissioner's failure to make the assignments by that date, his argument fails. Beginning on October 1, 1993, there are only two kinds of eligible beneficiaries: those who were assigned to assigned operators pursuant to the provisions of § 9706(a) and those who were not. The consequence flowing from the failure of the Commissioner to make those assignments before October 1, 1993, is clear from the plain language of the statute: the eligible beneficiaries who were not assigned are the *unassigned beneficiaries*. The premiums that every assigned operator must pay into the Combined Benefits Fund are calculated on the basis of those beneficiaries assigned to it and its aliquot share of the unassigned beneficiaries.

By specifying in the statute that "the Commissioner of Social Security shall, before October 1, 1993, assign each coal industry retiree . . . to a signatory operator," and by resting the entire scheme for calculation of premiums of the assignments made as of that date, Congress did speak directly and unambiguously on the issue of when the Commissioner's authority to make those assignments expired. "If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Chevron*, 467 U.S. at 842-43, 104 S. Ct. 2778.

We hold that the plain language of the statute is the end of the matter. The attempt of the SSA to create an ambiguity by pointing to the absence of specific language that says "and after October 1, 1993, the Commissioner shall not make any assignments," is misguided. Equally misguided is the attempt of the SSA to create an ambiguity by looking at the legislative history of the Coal Act. Indeed, in this case, as was the case in *I.N.S. v. Cardoza- Fonseca*, 480 U.S. 421, 107 S. Ct. 1207, 94 L.Ed.2d 434 (1987), "[t]he message conveyed by the plain language of the Act is confirmed by an examination of its history." *Id.* at 432, 107 S. Ct. 1207. We ought not look at the legislative history at all, but if we do, we need look no farther than the Conference Report to confirm that this legislation intended that all assignments of beneficiaries be made before October 1, 1993. While the Commissioner correctly notes that the Conference Report expressly states "[t]he conferees intend that the largest possible number of beneficiaries in the Plans be assigned to a specific or designated company," 138 Cong. Rec. S17,605 (daily ed., Oct. 8, 1992), he neglects to point out that this statement ap-

pears in the context of the Report's explanation of the order in which the statute requires that the signatory operators and related persons are to be assigned beneficiaries for whom they may be held responsible. Significantly, the Commissioner also neglects to mention that the statement he quotes is preceded by a lengthy explanation of how the unassigned beneficiary premiums are to be calculated. including this:

> As a practical matter, not all beneficiaries can be assigned to a specific last signatory operator, related person or assigned operator for payment purposes. This is because in some instances, none of those persons remain in business, even as defined to include non-mining related businesses. Thus, provisions are made for unassigned beneficiary premiums. In each plan year each assigned operator will pay a premium earmarked to cover the health costs of these unassigned beneficiaries.
>
> The amount of the unassigned beneficiary premium payable by each assigned operator will be calculated on the basis of the number of beneficiaries assignable to each operator as of October 1, 1993. . . .
>
> The first plan year is an eight-month period running from February 1, 1993 through October 1, 1993. . . . In the first plan year the Secretary of HHS will review the work history of each beneficiary and will prepare the assigned operator allocations which are *required to be made by October 1, 1993.*

Id. (emphasis added).

Because the statute is clear and unambiguous, there is no reason even to look to the legislative history. In

any event, the legislative history confirms the intent of Congress clearly expressed in the statute. The October 1, 1993 date is a deadline.

"[T]he court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Chevron*, 467 U.S. at 842-43, 104 S. Ct. 2778. Where the statute is clear, the agency has nothing to interpret and the court has no agency interpretation to which it may be required to defer. That is the case here. We therefore do not address the Commissioner's arguments with regard to the deference to which he claims the SSA's interpretation of this statute is entitled.

Because the statute requires that the SSA make all assignments of beneficiaries before October 1, 1993, it does not permit the SSA to make such assignments after that date. We therefore hold that the district court erred as a matter of law in holding that the SSA's contrary interpretation of the statute was entitled to deference.

IV. CONCLUSION

For the foregoing reasons, we reverse the District Court's order denying Plaintiff's motion for injunctive relief as to all assignments of beneficiaries made after September 30, 1993. We remand this matter to the district court for further proceedings not inconsistent with this opinion with regard to those few assignments to Dixie Fuel that may have been reassignments of beneficiaries initially assigned before October 1, 1993.

Supreme Court, U.S.
FILED
DEC 19 2001
CLERK

No. 01-705
No. 01-715

IN THE
Supreme Court of the United States

JO ANNE B. BARNHART, COMMISSIONER OF SOCIAL SECURITY, *Petitioner,*
v.
BELLAIRE CORPORATION, NACCO INDUSTRIES, AND NORTH AMERICAN COAL CORPORATION, *Respondents.*

JO ANNE B. BARNHART, COMMISSIONER OF SOCIAL SECURITY, *Petitioner,*
v.
PEABODY COAL COMPANY AND EASTERN ASSOCIATED COAL COMPANY, *Respondents.*

On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Sixth Circuit

BRIEF IN OPPOSITION FOR RESPONDENTS BELLAIRE CORPORATION, NACCO INDUSTRIES, INC. AND THE NORTH AMERICAN COAL CORPORATION

THOMAS A. SMOCK
MICHAEL D. GLASS
POLITO & SMOCK, P.C.
Four Gateway Center, Ste 400
444 Liberty Avenue
Pittsburgh, Pennsylvania 15222
(412) 394-3333

Counsel for Respondents

JEFFREY S. SUTTON
Counsel of Record
BRIAN G. SELDEN
JONES, DAY, REAVIS & POGUE
1900 Huntington Center
41 South High Street
Columbus, Ohio 43215
(614) 469-3855

2100

QUESTION PRESENTED

Under the Coal Industry Retiree Health Benefit Act of 1992, 26 U.S.C. § 9701 *et seq.*, Congress established a two-stage system for funding the health-care benefits of retired coal miners and their dependents. In accordance with the initial stage, Congress directed the Commissioner of the Social Security Administration to assign miners to responsible coal operators by October 1, 1993, and thereafter required those coal operators to begin paying premiums to the United Mine Workers of America Combined Benefit Fund for this initial category of beneficiaries. In accordance with the second stage, Congress provided that unassigned beneficiaries would receive full benefits through a separate funding mechanism that could draw upon, among other potential resources, premiums collected from all assigned operators on a *pro rata* basis.

The question presented is this: When the Act expressly provides that the Commissioner "shall, before October 1, 1993, assign each coal industry retiree who is an eligible beneficiary to a signatory operator" and when the Act expressly establishes a separate funding mechanism providing full benefits for all other miners and their dependents, may the Commissioner continue to make initial assignments after October 1, 1993 and as late as 1998?

PARTIES TO THE PROCEEDING

Respondents Bellaire Corporation and The North American Coal Corporation are subsidiaries or affiliates of respondent NACCO Industries, Inc., a publicly-held corporation. NACCO Industries itself has no publicly-held subsidiaries or affiliates. This brief refers to the three respondents collectively as "the Bellaire Group."

The petition filed by Jo Anne B. Barnhart consolidates the Bellaire Group's case with that of Peabody Coal Company and Eastern Associated Coal Company, parties that are not affiliated with the Bellaire Group.

The petition of Michael H. Holland and the other Trustees of the United Mine Workers Combined Benefit Fund includes only the Bellaire Group as respondents, as the lower courts denied these petitioners leave to intervene in the Peabody Coal and Eastern Associated Coal action.

TABLE OF CONTENTS

QUESTION PRESENTED i
PARTIES TO THE PROCEEDING ii
TABLE OF AUTHORITIES iv
STATEMENT 1
I. FACTUAL HISTORY 2
II. PROCEDURAL HISTORY 3
REASONS FOR DENYING THE WRIT 4
I. THIS SHALLOW DIVISION OF AUTHORITY DOES NOT WARRANT REVIEW. 4
II. THE LOWER COURT CORRECTLY RESOLVED THE QUESTION ON THE MERITS. 6
A. The Text Of The Coal Act Supports The Sixth Circuit's Interpretation. 6
B. The Structure Of The Coal Act Supports The Sixth Circuit's Interpretation. 10
C. Petitioner's Predecessor Agreed. 12
CONCLUSION 14

TABLE OF AUTHORITIES

CASES

Anderson v. Yungkau, 329 U.S. 482 (1947) 7
In re Blue Diamond Coal Co., 79 F.3d 516 (6th Cir. 1996) 5
Brock v. Pierce County, 476 U.S. 253 (1986) 8-9
In re Chateaugay Corp., 53 F.3d 478 (2d Cir. 1995) 5
Chevron, U.S.A., Inc. v. National Res. Def. Council, Inc., 467 U.S. 837 (1984) 6-7
Davon, Inc. v. Shalala, 75 F.3d 1114 (7th Cir. 1996) 5
Dixie Fuel Co. v. Commissioner of Social Security, 171 F.3d 1052 (1999) 2, 4, 6, 7
Duncan v. Walker, 121 S.Ct. 2120 (2001) 10
Eastern Enterprise v. Apfel, 524 U.S. 498 (1998) 2, 5
Elgin National Industries v. Halter, No. 01-CV-397 (D.D.C.) 5
Escoe v. Zerbst, 295 U.S. 490 (1935) 7
Holland v. Keenan Trucking Co., 102 F.3d 736 (4th Cir. 1996) 5
Holland v. Pardee Coal Co., 269 F.3d 424 (4th Cir. 2001) 4
Holland v. Williams Mountain Coal Co., 256 F.3d 819 (D.C. Cir. 2001) 5
Mead Corp. v. Halter, No. 01-3277 (6th Cir.) 5
National Coal Association v. Chater, 81 F.3d 1077 (11th Cir. 1996) 5

Nell Jean Industries, Inc. v. Barnhardt, No. 01-CV-2006 (D.D.C.) 4-5
Pratt Mining Co. v. Barnhart, CA: 00-0856 (S.D. W.Va.) 4
Regions Hospital v. Shalala, 522 U.S. 448 (1998) 8
Shenango, Inc. v. Commissioner of Social Security, No. 00-2525 (3d Cir.) 4
In re Sunnyside Coal Co., 146 F.3d 1273 (10th Cir. 1998) 5
TRW Inc. v. Andrews, 122 S.Ct. 441 (2001) 10
United States v. James Daniel Good Real Prop., 510 U.S. 43 (1993) 8
United States v. Monsanto, 491 U.S. 600 (1989) 7, 11
United States v. Montalvo-Murillo, 495 U.S. 711 (1990) 8
United States v. Price, 361 U.S. 304 (1960) 12
Unity Real Estate Co. v. Hudson, 178 F.3d 649 (3d Cir. 1999) 5

STATUTES

The Coal Industry Retiree Health Benefit Act of 1992, 26 U.S.C.
§ 9702(a)(1) 11
§ 9702(a)(2) 11
§ 9702(c) 11
§ 9703(b)(4) 11
§ 9703(e) 11
§ 9703(c)(1) 11
§ 9704 ..... *passim*
§ 9705 ..... 1, 7
§ 9704(f) 12
§ 9704(g) 12
§ 9704(h) 11
§ 9706(a) ..... *passim*

§ 9706(c) 11
§ 9721 5
29 U.S.C. § 1451 5

CONGRESSIONAL HISTORY

Coal Industry Retiree Health Benefit Act of 1992: Hearing on Serial 104-67 Before the Subcomm. On Oversight of the House Comm. On Ways and Means, 104th Cong. 22 (1995) 13
Provisions Relating to the Health Benefits of Retired Miners: Hearing on Serial 103-59 Before the House Committee on Ways and Means, 103d Cong. 41 (1993) 12

BRIEF IN OPPOSITION FOR RESPONDENTS BELLAIRE CORPORATION, NACCO INDUSTRIES, INC. AND THE NORTH AMERICAN COAL CORPORATION

Respondents Bellaire Corporation, Nacco Industries, Inc. and the North American Coal Corporation (collectively, "the Bellaire Group") respectfully submit this combined brief in opposition to the petition filed in No. 01-705 by the Commissioner of Social Security and to the petition filed in No. 01-715 by Michael H. Holland and other trustees of the United Mine Workers of American Combined Benefit Fund.

STATEMENT

In enacting the Coal Industry Retiree Health Benefit Act of 1992, 26 U.S.C. § 9701 *et seq.*, Congress established a series of funding mechanisms that would provide health and disability benefits for former coal miners and their dependents. One innovation of the Act stemmed from its two-stage system for funding benefits.

Under the first funding stage, the Act requires the Commissioner of Social Security to "assign" miners (and their dependents) to the coal operators for whom they worked. The assigned operators then pay premiums to the United Mine Workers of America Combined Benefit Fund for the health-care benefits of this first category of beneficiaries. Under the second stage, the Act requires the Commissioner to establish a separate funding mechanism for all other miners and their dependents, which draws resources from, among other funds, "unassigned" beneficiary premiums collected from all assigned operators on a *pro rata* basis. *See* 26 U.S.C. §§ 9704 and 9705.

In October 1992, Congress set this bifurcated system in motion with a series of deadlines, the most important of which required the Commissioner to make all first-level assignments by October 1, 1993. "[T]he Commissioner of Social Security shall," the Coal Act unequivocally states, "assign each coal industry retiree who is an eligible beneficiary" to a signatory

operator if one can be found "before October 1, 1993." 26 U.S.C. § 9706(a).

More than two years ago, the Sixth Circuit treated the October 1, 1993 deadline as the lynchpin of "the entire scheme for calculation of premiums of the assignments made as of that date." *Dixie Fuel Co. v. Comm'r of Soc. Sec.*, 171 F.3d 1052, 1063 (1999). Later decisions in that court and elsewhere agreed. Under each of these rulings, beneficiaries whom the Commissioner did not assign as of October 1, 1993 were not deprived of benefits. They simply received their benefits from the unassigned pool, just as the two-stage funding system contemplated.

The Commissioner and the Trustees of the Combined Benefit Fund have been less than accepting of these decisions. Both within the Sixth Circuit and without, they have continued to litigate the point at every turn. Now that this strategy has been rewarded with a favorable outcome in the Fourth Circuit, the Commissioner and Trustees promptly claim that certiorari is warranted. But because this modest division of authority is insufficiently deep or mature to warrant review and because no coal miner or dependent will lose a single benefit while other courts look at this interpretive issue, the Court should deny the writ. Further percolation of the issue not only may eliminate this division of authority eventually, but at a minimum it will provide other lower courts with an opportunity to weigh in on, and contribute to the resolution of, this question.

I. FACTUAL HISTORY

Between the Coal Act's effective date of October 24, 1992 and October 1, 1993, the Commissioner assigned the Bellaire Group responsibility to pay premiums for more than 1,000 Coal Act beneficiaries. While the Bellaire Group has challenged a discrete number of those assignments on grounds ranging from misidentification to unconstitutional-reachback under *Eastern Enterprises v. Apfel*, 524 U.S. 498 (1998), the

vast majority of these initial assignments remain undisputed and all premiums on them have been paid. The Bellaire Group also remains exposed to the potential obligation to make *pro rata* "unassigned beneficiary premiums" in the event a fiscal need to require such second-stage premiums ever arises.

At issue in this case are 270 miners whom the Commissioner tried to assign to the Bellaire Group from the unassigned miner pool and most notably tried to assign after October 1, 1993. The Commissioner assigned just a handful of this group—41 miners in all—to the Bellaire Group in calendar year 1993. The overwhelming majority were assigned after the Commissioner took a one-and-a-half year hiatus from making initial assignments. The Commissioner thus assigned a majority of the 270 miners in 1996, and made some assignments as late as 1998. Nonetheless, according to the Commissioner, the Bellaire Group owes premiums on all 270 miners from 1993 to the present.

The Bellaire Group has paid $4,042,510.56 in premiums on those assignees to date and, were it not for injunctive relief in the district court, would owe approximately $40,000 per month in premium payments into the future.

II. PROCEDURAL HISTORY

On June 30, 2000, the district court entered a final judgment in favor of the Bellaire Group, voiding each of the 270 assignments that the Commissioner attempted to make after the October 1, 1993 deadline. The Sixth Circuit has refused the Government's and Trustees' invitation to alter that ruling on three separate occasions—once by rejecting a motion for preliminary *en banc* review, then by ruling against petitioners in its panel decision, and lastly by rejecting a subsequent motion for *en banc* review.

After three separate motions for an extension of time, petitioners filed these two petitions for a writ of certiorari. Both petitions were filed just a month after the Fourth Circuit

entered its decision in *Holland v. Pardee Coal Co.*, 269 F.3d 424 (4th Cir. 2001).

REASONS FOR DENYING THE WRIT

Now that the Fourth Circuit has created what Judge Niemeyer criticized in dissent as an "unnecessary" conflict with the Sixth Circuit, *Pardee Coal*, 269 F.3d at 439, the Commissioner and Trustees claim that this discrete Coal Act question suddenly warrants review. In their haste, however, they overlook the shallow nature of the division of authority, to say nothing of the possibility that pending cases will give the Fourth and Sixth Circuits additional opportunities for *en banc* review and that pending cases within the D.C. and Third Circuits will give those courts an opportunity to consider the issue. Now is not the time and this is not the case to review this question.

I. THIS SHALLOW DIVISION OF AUTHORITY DOES NOT WARRANT REVIEW.

While the nascent conflict between *Dixie Fuel* and *Pardee Coal* is real, it falls well below the Court's traditional requirements for granting review. As an initial matter, *Pardee Coal* is now barely two months old, and several pending district court cases will give the Fourth Circuit additional opportunities to grant *en banc* review of this 2-1 decision. There is in short ample reason to believe that the split will not last long.

But even if *Pardee Coal* survives, other opportunities assuredly will arise for the Court to look at the question. In the Third Circuit, a similar § 9706(a) issue is pending in *Shenango, Inc. v. Commissioner of Social Security*, No. 00-2525. In the Sixth Circuit, the same question is pending in *Mead Corp. v. Halter*, No. 01-3277. And in the Fourth Circuit, as noted, multiple district-level cases are percolating on the issue, *see, e.g., Pratt Mining Co. v. Barnhart*, CA:00-0856 (S.D. W.Va.), as is true in the D.C. Circuit, *see Nell Jean*

Indus., Inc. v. Barnhardt, No. 01-CV-2006 (D.D.C.) and *Elgin Nat'l Indus. v. Halter*, No. 01-CV-397 (D.D.C.). Because the Commissioner and Trustees thus far have chosen to litigate this Coal Act issue at every opportunity, it is a virtual certainty that they will present the Court with additional petitions raising this question—assuming the division of authority does not dissipate over time.

Nor may the Commissioner sidestep this deficiency in her petition by contending (Pet. 23-24) that the most important lower courts have voiced their opinions. True enough, significant "extractive bituminous coal mining" occurs in the States within the Sixth and Fourth Circuits. But it is also true that Alabama, Utah, Pennsylvania and other States (from other circuits) have substantial operations as well. Indeed, as the Trustees themselves acknowledge (Pet. 4), the Coal Act has generated appellate opinions from coast to coast. *See, e.g., Eastern Enter. v. Apfel*, 524 U.S. 498 (1998) (arising out of the First Circuit); *In re Chateaugay Corp.*, 53 F.3d 478 (2d Cir. 1995); *Unity Real Estate Co. v. Hudson*, 178 F.3d 649 (3d Cir. 1999); *Holland v. Keenan Trucking Co.*, 102 F.3d 736 (4th Cir. 1996); *In re Blue Diamond Coal Co.*, 79 F.3d 516 (6th Cir. 1996); *Davon, Inc. v. Shalala*, 75 F.3d 1114 (7th Cir. 1996). *See also In re Sunnyside Coal Co.*, 146 F.3d 1273 (10th Cir. 1998); *Nat'l Coal Ass'n v. Chater*, 81 F.3d 1077 (11th Cir. 1996); *Holland v. Williams Mountain Coal Co.*, 256 F.3d 819 (D.C. Cir. 2001). The Court has not traditionally reviewed divisions of authority involving just two appellate courts, and there is no compelling reason why it should do so here.

Even less availing is the Trustees' fear (Pet. 18-19) that coal operators "will concentrate their litigation efforts" in the Sixth Circuit. Certainly, coal operators may do so. But federal law still requires proper jurisdiction and venue, *see* 29 U.S.C. § 1451 and 26 U.S.C. § 9721, and even the Commissioner tacitly concedes (Pet. 23-24) that many operators are unlikely to establish any basis for Sixth Circuit

review. In the end, if the issue carries the magnitude that petitioners jointly assert, it undoubtedly will reach more appellate courts in the next several years.

II. THE LOWER COURT CORRECTLY RESOLVED THE QUESTION ON THE MERITS.

A. The Text Of The Coal Act Supports The Sixth Circuit's Interpretation.

Besides involving a two-court circuit split that is barely two months old, the petition should also be denied because the Sixth Circuit faithfully adhered to the express language and explicit two-stage funding structure that Congress established in passing the Coal Act. This, too, counsels against review.

In creating this two-stage funding scheme, Congress in no uncertain terms directed the Commissioner to act at once:

> For purposes of this chapter, the Commissioner of Social Security *shall, before October 1, 1993*, assign each coal industry retiree who is an eligible beneficiary to a signatory operator....

26 U.S.C. § 9706(a) (emphasis added). In a prior decision involving this identical issue, the Sixth Circuit construed this language to mean that "[t]he October 1, 1993 date is a deadline" and that the Coal Act "does not permit the SSA to make such assignments after that date." *Dixie Fuel*, 171 F.3d at 1064. And it supported that decision by pointing to the funding provisions for miners who were not assigned by the October 1, 1993 deadline. *Id.* at 1062. Relying on *Dixie Fuel*, the Sixth Circuit applied the same reasoning to the Commissioner's and Trustees' arguments here.

Not just *stare decisis,* but basic principles of statutory construction, required the Sixth Circuit to do exactly that. When a statute is clear and unambiguous, the Court has reminded litigants, "that is the end of the matter." *Chevron, U.S.A., Inc. v. Nat'l Res. Def. Council, Inc.*, 467 U.S. 837, 842

(1984). That rule has special application when Congress uses the directive "shall," which generally imposes mandatory duties on the regulated entity, and when Congress provides consequences for failing to satisfy the imposed duty. *See, e.g., United States v. Monsanto*, 491 U.S. 600, 607 (1989) (observing that "Congress could not have chosen stronger words" than "'shall order' the forfeiture" to "express its intent that forfeiture be mandatory"); *Anderson v. Yungkau*, 329 U.S. 482, 485 (1947) ("The word 'shall' is ordinarily 'the language of command.'") (quoting *Escoe v. Zerbst*, 295 U.S. 490, 493 (1935)).

Applied here, these precedents and the common-sense reasoning behind them support the Sixth Circuit's decision. The National Legislature's unyielding language could not have been more straightforward. The statute required the Commissioner to make initial assignments by October 1, 1993, plain and simple. Nor was the "shall" directive in the Act without consequence. The Act explicitly provides a funding mechanism for miners and their dependents not covered by these initial assignments, which includes authority to impose "unassigned" beneficiary premiums on coal operators. A two-stage funding mechanism makes little sense if the initial funding determination never ends.

Against this backdrop, petitioners' three grounds for reading "shall" in § 9706(a) as an exhortation rather than a command are more wishful than real. Their first argument—that the Sixth Circuit lacked jurisdiction even to decide *Dixie Fuel* in 1999 (*see* U.S. Pet. 12, n.8 and Trustee Pet. 19-20)—is the least persuasive of all. Even aside from the fact that the Commissioner chose not to seek review of *Dixie Fuel* on this ground or any other, the Sixth Circuit's reaffirmance of *Dixie Fuel* in this case by itself defeats the point.

Petitioners next rely (U.S. Pet. 16, Trustee Pet. 21-23) on *Brock v. Pierce County*, 476 U.S. 253 (1986), *United States v.*

Montalvo-Murillo, 495 U.S. 711 (1990), *United States v. James Daniel Good Real Prop.*, 510 U.S. 43 (1993), and *Regions Hosp. v. Shalala*, 522 U.S. 448 (1998), to support their claim. But this argument fares no better.

Regions Hospital, as an initial matter, did not involve a deadline at all. Unlike other parts of the Medicare Act, the applicable provision was "silent on the matter of time," *id.* at 459, leading *Regions Hospital* sensibly to hold that the Secretary of Health and Human Services could correct prior miscalculations after the fact. *Id.*

Nor do *Brock*, *Montalvo-Murillo* or *James Daniel* involve efforts to read "shall" in a non-mandatory way. The core issue in each of those cases was how to determine "the consequences of a failure to" comply with a statutory deadline when the statute fails to suggest what that consequence should be. *See, e.g., Brock*, 476 U.S. at 259. In *Montalvo-Murillo*, for example, the Court considered whether the government's failure to complete a detention hearing on a person's "first appearance" before a judicial officer "requires the release" of the suspect. *Id.*, 495 U.S. at 717. Because Congress provided no statutory consequence for failing to meet the deadline, the Court refused to "invent a remedy" outside of the statutory scheme. *Id.* at 721. *James Daniel* followed the same path in the context of a civil forfeiture statute, reasoning that where "Congress [fails] to specify a consequence for noncompliance," the Court would not infer a remedy of dismissal. 510 U.S. at 64-65.

Brock comes to the same conclusion. At issue was the Comprehensive Employment and Training Act, which empowered the Secretary of Labor to investigate complaints and audits regarding the alleged misuse of CETA funds, and which provided that the Secretary "'shall' determine 'the truth of the allegation or belief involved, not later than 120 days after receiving the complaint.'" *Brock*, 476 U.S. at 256. The statute, however, did not identify any consequences for the

Secretary's failure to meet that 120-day deadline. *Id.* at 259. Under these circumstances, *Brock* refused to hold that the inability to meet the 120-day deadline meant that the agency should "lose . . . enforcement power" altogether, creating an enforcement vacuum. *Id.* at 266.

Yet no such vacuum and no such set of statutory inferences exist here. Contrary to the Commissioner's claim (Pet. 17) that the Coal Act fails to establish any "consequence" for unmade assignments, the Act's two-stage assignment scheme is tailored precisely to handle that contingency. It places those beneficiaries whom the Commissioner fails to assign by October 1, 1993 into the unassigned miner pool; it does not provide that these beneficiaries must wait to go into the unassigned pool until the Commissioner decides—one, two, even five, years later—to make further assignments. A similar conclusion follows from the specific funding mechanisms established by the Coal Act for this group of unassigned beneficiaries. The Act separately funds these health-care benefits by (1) transfers from the overfunded 1950 UMWA Pension Plan; (2) transfers of interest from the corpus of the Abandoned Mine Land Trust ("AML"); and, if necessary, (3) "unassigned" beneficiary premiums collected from all assigned operators on a *pro rata* basis. 26 U.S.C. §§ 9704 and 9705.

In this statutory context, petitioners' reliance on *Brock*, *James Daniel Good*, *Montalvo-Murillo* and *Regions Hospital* ultimately gives analogy a bad name. The Coal Act's explicit "shall" directive, together with its provisions for funding benefits for miners that are not included in these initial assignments, represents a far cry from the statutes at issue in these decisions.

Lastly, these same congressionally-enacted funding mechanisms undermine petitioners' concerns (U.S. Pet. 18-19, Trustee Pet. 16-17) about the solvency of the AML fund and the payment obligations of "other, private parties." If

Congress did not want interest from the AML fund to be used to pay for the health-care benefits of unassigned miners, it would not have created a statute that mandated it, much less made this funding mechanism a prominent source of revenue. And as for "private parties"? One of them is the Bellaire Group itself, which stands prepared to pay its full *pro rata* share for benefits that must be provided to this group of miners and their dependents.

Not one of petitioners' three arguments, then, shows that the Sixth Circuit erred. At the same time, moreover, neither petitioner offers any tenable explanation why Congress would establish an October 1, 1993 deadline if the deadline were in the end utterly meaningless. Less than two months ago, the Court reaffirmed the time-respected canon against such constructions: "a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant." *TRW Inc. v. Andrews*, 122 S.Ct. 441, 449 (2001) (quoting *Duncan v. Walker*, 121 S.Ct. 2120, 2125 (2001)). Yet the petitioners' reading would render "by October 1, 1993" purposeless and irrelevant. Their interpretation fails on this independent ground as well.

B. The Structure Of The Coal Act Supports The Sixth Circuit's Interpretation.

Nor can petitioners' collective effort to read the October 1, 1993 deadline out of the Coal Act be justified by the Act as a whole. The structure and organization of the Act turn on a series of express deadlines and key dates. As even a cursory reading of the Act reveals, these deadlines are anything but casual:

— Coal Act beneficiaries are limited to miners and dependents already enrolled in and receiving benefits from the 1950 or 1974 United Mine Workers Association benefit plans "as of July 20, 1992." 26 U.S.C. § 9703(e).

— The 1950 and 1974 UMWA benefit plans had to provide, "where ascertainable from plan records, the names of all persons described in subsection (a) with respect to any eligible beneficiary or deceased eligible beneficiary" no later than October 1, 1992 or the 20th day after the enactment date. 26 U.S.C. § 9706(c).

— The Trustees of the new benefit plan had to be designated "as soon as practicable (but not later than 60 days) after the enactment date." 26 U.S.C. § 9702(a)(1).

— The Trustees "shall, not later than 60 days after the enactment date, furnish to the Commissioner of Social Security information as to the benefits and covered beneficiaries under the fund, and such other information as the [Commissioner] may require to compute any premium under this section." 26 U.S.C. § 9704(h).

— The 1950 and 1974 UMWA benefit plans had to merge by February 1, 1993. 26 U.S.C. § 9702(a)(2).

— The Combined Fund became the source of all benefits as of February 1, 1993. 26 U.S.C. §§ 9703(b)(4) and (c)(1).

And as to this dispute, the following deadlines are inextricably bound up with the requirement that final assignments be made by October 1, 1993:

— The first "plan year" runs from February 1, 1993 to September 30, 1993. 26 U.S.C. § 9702(c).

— Coal operators' premiums for unassigned beneficiaries are calculated as of the October 1, 1993 deadline. 26 U.S.C. § 9704(f).

— The first premiums are due on October 25, 1993—three weeks after the assignment deadline. 26 U.S.C. § 9704(g).

From beginning to end, the Coal Act is a comprehensive and time-based scheme that values predictability and certainty. The Act relies on specific and pre-identified dates designed to establish stability where there once had been chaotic plan administration.

C. Petitioner's Predecessor Agreed.

One last merits point deserves a brief rebuttal. In addition to the above arguments, the Commissioner relies (Pet. nn. 5, 6, 7, 19 and 20) on legislative history from committee and subcommittee proceedings after the Coal Act became law. As an initial matter, such "history" is unreliable at best, as post-enactment views generally '"form a hazardous basis for inferring the intent' behind a statute." *Monsanto*, 491 U.S. at 610 (quoting *United States v. Price*, 361 U.S. 304, 313 (1960)).

But even if one does consider post-enactment commentaries or the financial analysis offered by hindsight, that view fails the Commissioner as well. In one post-enactment committee hearing, for example, Petitioner's predecessor, Acting Commissioner Lawrence H. Thompson, acknowledged that he was on a deadline in making his initial assignments:

> I am also happy to report that we are making good progress and fully expect to meet the *statutory due date* for carrying out our assigned tasks under the Act.

Provisions Relating to the Health Benefits of Retired Coal Miners: Hearing on Serial 103-59 Before the House Committee on Ways and Means, 103rd Cong., September 9, 1993 (Committee Print 1994) at 21-26 (emphasis added). That same day—just 21 days before October 1, 1993—Mr. Thompson concluded with an express description of what would become the lower court's position here:

> In conclusion, I want to stress that SSA is working hard to fulfill its responsibilities under the Coal Act. I am pleased to report that SSA is making excellent progress with the assignment process. To date we have completed about 40 percent of the assignments. *We fully expect that we will meet our statutory responsibility to calculate the amount of the health benefit premium due for each beneficiary and complete the assignment process by October 1, 1993.*

Id. at 26 (emphasis added). And two years later, Mr. Thompson returned to Congress as Principal Deputy Commissioner to report success: "SSA completed the process of making the initial assignment decisions by October 1, 1993, as required by law." *Coal Industry Retiree Health Benefit Act of 1992: Hearing on Serial 104-67 Before the Subcomm. On Oversight of the House Comm. On Ways and Means*, 104th Cong. 22-23 (1995). Of course, this testimony only reflected the Commissioner's actual practice; he stopped making assignments in October 1993, and this litigation was not triggered until the new Commissioner unexpectedly resumed making original assignments in June 1995.

What was true when the Commissioner testified in 1993, however, remains true now. The straightforward words of the provision allow but one conclusion: The Coal Act's explicit October 1, 1993 deadline is in design ("shall") and in effect (*see* prior views of the Commissioner) mandatory. Even if error correction were a traditional ground for seeking review in this Court, which it is not, no interpretive errors occurred here.

CONCLUSION

The petition should be denied.

Respectfully submitted,

JEFFREY S. SUTTON
Counsel of Record
BRIAN G. SELDEN
JONES, DAY, REAVIS & POGUE
1900 Huntington Center
41 South High Street
Columbus, Ohio 43215
(614) 469-3855

THOMAS A. SMOCK
MICHAEL D. GLASS
POLITO & SMOCK, P.C.
Four Gateway Center
Suite 400
444 Liberty Avenue
Pittsburgh, Pennsylvania 15222
(412) 394-3333

Counsel for Respondents Bellaire Corporation, NACCO Industries, Inc. and the North American Coal Corporation

SUPREME COURT, U.S.
FILED
DEC 19 2001
CLERK

No. 01-705

IN THE
Supreme Court of the United States

JO ANNE B. BARNHARDT, COMMISSIONER OF SOCIAL SECURITY,
Petitioner,
v.
PEABODY COAL COMPANY AND EASTERN ASSOCIATED COAL CORP.
Respondents.

JO ANNE B. BARNHARDT, COMMISSIONER OF SOCIAL SECURITY,
Petitioner,
v.
BELLAIRE CORPORATION, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF IN OPPOSITION FOR RESPONDENTS PEABODY COAL COMPANY AND EASTERN ASSOCIATED COAL CORP.

JOHN R. WOODRUM
W. GREGORY MOTT
HEENAN, ALTHEN & ROLES LLP
1110 Vermont Avenue, N.W.
Suite 400
Washington, D.C. 20005
(202) 887-0800

JOHN G. ROBERTS, JR.*
LORANE F. HEBERT
HOGAN & HARTSON L.L.P.
555 Thirteenth Street, N.W.
Washington, D.C. 20004
(202) 637-5810

*Counsel of Record

Counsel for Respondents

QUESTION PRESENTED

Whether the Sixth Circuit correctly held that the Commissioner of Social Security lacked the authority to make initial assignments of beneficiaries under the Coal Industry Retiree Health Benefit Act of 1992, 26 U.S.C. §§ 9701 *et seq.*, on or after October 1, 1993, when the statute explicitly provides that the Commissioner "*shall, before October 1, 1993*, assign each coal industry retiree who is an eligible beneficiary to a signatory operator * * * or any related person * * * which remains in business."

RULE 29.6 STATEMENT

Respondents Peabody Coal Company and Eastern Associated Coal Corp. are wholly-owned subsidiaries of Peabody Energy Corporation, a publicly held corporation.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
RULE 29.6 STATEMENT	ii
TABLE OF AUTHORITIES	iv
STATEMENT OF THE CASE	3
REASONS FOR DENYING THE WRIT	7
I. THE CONFLICT BETWEEN THE DECISIONS OF THE SIXTH AND FOURTH CIRCUITS DOES NOT WARRANT THIS COURT'S REVIEW	7
II. THE SIXTH CIRCUIT'S INTERPRETATION OF THE COAL ACT IS CONSISTENT WITH THIS COURT'S PRECEDENTS	13
CONCLUSION	18

TABLE OF AUTHORITIES

Page

Cases:

Arizona v. *Evans*, 514 U.S. 1 (1995) 13
Brock v. *Pierce County*, 476 U.S. 253 (1986) 13
City of Oklahoma City v. *Tuttle*, 471 U.S. 808 (1985) 2
Dixie Fuel Co. v. *Commissioner of Soc. Sec.*, 171 F.3d 1052 (1999) 2,11,13
Eastern Enters. v. *Apfel*, 524 U.S. 498 (1998) 11
Holland v. *King Knob Coal Co.*, 87 F. Supp. 2d 433 (W.D. Pa. 2000) 12
Holland v. *Pardee Coal Co.*, 269 F.3d 424 (2001) 2,10
INS v. *Cardoza-Fonseca*, 480 U.S. 421 (1987) 17
United States v. *James Daniel Good Real Property*, 510 U.S. 43 (1993) 13
United States v. *Montalvo-Murillo*, 495 U.S. 711 (1990) 13
Watt v. *Alaska*, 451 U.S. 259 (1981) 2,17

Statutes:

26 U.S.C. §§ 9701 *et seq.* 1
26 U.S.C. § 9701(b)(1) 4
26 U.S.C. § 9701(c)(1) 4
26 U.S.C. § 9701(c)(2)(A) 4,10
26 U.S.C. § 9701(c (5) 4
26 U.S.C. § 9701(c)(7) 4
26 U.S.C. § 9702(a)(1)(2) 4
26 U.S.C. § 9702(c) 5
26 U.S.C. § 9703(a) 7
26 U.S.C. § 9703(b)(1) 4
26 U.S.C. § 9703(e) 5
26 U.S.C. § 9703(f)(1)(2) 4
26 U.S.C. § 9704(a) 4
26 U.S.C. § 9704(a)(1) 4

TABLE OF AUTHORITIES — Continued

Page

Statutes:

26 U.S.C. § 9704(a)(3) 6,7,10,14
26 U.S.C. § 9704(d) 6,7,10,14
26 U.S.C. § 9704(f)(2)(A) 14
26 U.S.C. § 9704(f)(2)(B) 14
26 U.S.C. § 9705(a)(1) 6,8
26 U.S.C. § 9705(a)(3) 6,8
26 U.S.C. § 9705(b)(1) 6,7,8
26 U.S.C. § 9705(b)(2) 6,7,8
26 U.S.C. § 9706(a) 4,5,10
26 U.S.C. § 9706(a)(1)-(3) 4
26 U.S.C. § 9706(c) 5
26 U.S.C. § 9706(d) 5
26 U.S.C. § 9706(f) 14
26 U.S.C. § 9721 12
29 U.S.C. § 1451(d) 12
30 U.S.C. § 1232(h) 7,8
30 U.S.C. § 1232(h)(2)(A) 7
30 U.S.C. § 1232(h)(2)(B) 7
30 U.S.C. § 1232(h)(3)(A) 7
30 U.S.C. § 1232(h)(3)(B) 7
Pub. L. No. 102-486, § 19142(b)(1)-(3), 106 Stat. 3037 3,14,16

Legislative Materials:

Agency Management of the Implementation of the Coal Act: Hearing Before the Subcomm. on Government Oversight of Management, Restructuring, and the District of Columbia of the Senate Governmental Affairs Comm. 105th Cong. (1998) 11

TABLE OF AUTHORITIES — Continued

Page

Legislative Materials:

Coal Industry Retiree Health Benefit Act of 1992: Hearing Before the Subcomm. on Oversight of the House Ways and Means Comm. 104th Cong. (1995) 17

Provisions Relating to the Health Benefits of Retired Miners: Hearing Before the House Ways and Means Comm., 103rd Cong. (1993) 6

146 Cong. Rec. S3835 (May 10, 2000) 8

Regulation:

58 Fed. Reg. 52,914 (Oct. 13, 1993) 14

Other Authorities:

Letter from Gloria L. Jarmon, United States General Accounting Office, to the Honorable William V. Roth, Jr. (Aug. 31, 2000) 9

Office of Surface Mining Reclamation and Enforcement, United States Dep't of Interior, *Memorandum of Understanding Between the Office of Surface Mining Reclamation and Enforcement of the United States Dep't of Interior and the United Mine Workers of America Combined Benefit Fund* (Nov. 6, 1996) 9

IN THE

Supreme Court of the United States

No. 01-705

JO ANNE B. BARNHARDT, COMMISSIONER OF SOCIAL SECURITY,

Petitioner,

v.

PEABODY COAL COMPANY AND EASTERN ASSOCIATED COAL CORP.,

Respondents.

JO ANNE B. BARNHARDT, COMMISSIONER OF SOCIAL SECURITY,

Petitioner,

v.

BELLAIRE CORPORATION, *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF IN OPPOSITION FOR RESPONDENTS PEABODY COAL COMPANY AND EASTERN ASSOCIATED COAL CORP.

In the decisions below, the Sixth Circuit held that the Commissioner of Social Security lacked the authority under the Coal Industry Retiree Health Benefit Act of 1992 (the "Coal Act"), 26 U.S.C. §§ 9701 *et seq.*, to make initial

assignments of beneficiaries to respondents on or after October 1, 1993. *See* Pet. App. 1a, 3a. The court's rulings rested on its earlier decision in *Dixie Fuel Co.* v. *Commissioner of Social Security*, 171 F.3d 1052 (1999) (Pet. App. 27a), in which the court examined the "entire statutory scheme" and concluded that "Congress[] inten[ded] that all assignments be completed by October 1, 1993." Pet. App. 45a. In *Holland* v. *Pardee Coal Co.*, 269 F.3d 424 (2001), a divided panel of the Fourth Circuit reached the opposite conclusion.

That conflict notwithstanding, the petition should be denied. As this Court has observed, the "decision to grant certiorari represents a commitment of scarce judicial resources." *City of Oklahoma City* v. *Tuttle*, 471 U.S. 808, 816 (1985). And "it is certainly safe to assume that whenever [the Court] grant[s] certiorari in a case not deserving plenary review, [it] increase[s] the likelihood that certiorari will be denied in other, more deserving cases." *Watt* v. *Alaska*, 451 U.S. 259, 274 n.1 (1981) (Stevens, J., concurring). Such would be the result if the Court were to grant certiorari here.

The conflict between the Sixth and Fourth Circuits is not dire. Regardless of whether assignments made on or after October 1, 1993, are valid, retired coal mine workers and their dependents will continue to receive the same benefits they have been receiving all along. At the same time, the Combined Fund does not stand to lose a single dollar in net revenue. And because the Fund is of limited duration, the conflict will not have any lasting impact.

Moreover, the Sixth Circuit's interpretation of the Coal Act is correct. Should the Court decline to review the question presented, either now or after other circuits have expressed their views, the Commissioner may well implement the Sixth Circuit's decisions on a nationwide basis. Thus, the denial of certiorari could lead in any event to the result Congress

intended. This Court should reserve its scare resources for another case truly deserving of review.

STATEMENT OF THE CASE

In enacting the Coal Act, Congress's overriding concern was the continued provision of health benefits to retired mine workers. For years, retiree health benefits had been provided through multi-employer health plans established pursuant to collective bargaining agreements negotiated by the United Mine Workers of America and the coal industry. The plans were funded by contributions from coal operators, and continued to provide benefits to eligible retirees even after their former employers went out of business or otherwise stopped contributing to the plans. Such benefits were financed by the remaining participating coal operators, even though those operators and the retirees whose benefits they financed may never have had an employment relationship.

By the late 1980s, the plans had run into serious financial trouble as health care costs increased and coal operators stopped contributing to the plans because they no longer employed union employees or had left the coal business altogether. Congress responded by enacting the Coal Act, in which Congress declared its policy to be "to remedy problems with the provision and funding of health care benefits with respect to the beneficiaries of multiemployer benefit plans that provide health care benefits to retirees in the coal industry," "to allow for sufficient operating assets for such plans," and "to provide for the continuation of a privately financed self-sufficient program for the delivery of health care benefits to the beneficiaries of such plans." Pub. L. No. 102-486, § 19142(b)(1)-(3), 106 Stat. 3037. To accomplish those objectives, the Coal Act merged the existing multi-employer plans (the 1950 and 1974 UMWA Benefit Plans) into a new private multi-employer plan known as the United Mine Workers of America Combined

Benefit Fund (the "Combined Fund"). *See* 26 U.S.C. § 9702(a)(1)(2).

The Combined Fund provides "substantially the same" health benefits that retirees and their dependents received under the 1950 and 1974 plans to each "eligible beneficiary." *Id.* at § 9703(b)(1).[1] An "eligible beneficiary" is defined as a coal industry retiree who, on July 20, 1992, was receiving benefits under the 1950 or 1974 plan, or an individual who, on such date, was receiving such benefits by reason of a relationship to such a retiree. *Id.* at § 9703(f)(1)(2). Coal industry workers retiring after July 20, 1992, are not eligible for benefits under the Fund. Thus, at its inception, the Combined Fund had a fixed number of beneficiaries which would continue to decline over the life of the Fund.

The Combined Fund is financed in part by annual premiums assessed against "assigned operators," *i.e.*, coal operators which signed a coal wage agreement requiring the provision of health benefits to retirees or contributions to the 1950 or 1974 plans, and which "conduct[] or derive[] revenue from any business activity, whether or not in the coal industry." *Id.* at §§ 9701(b)(1), (c)(1), (5), (7), 9704(a), 9706(a). If an assigned operator is no longer involved in any business activity, premiums may be assessed against "related persons," including businesses or corporations under common control. *Id.* at §§ 9701(c)(2)(A), 9706(a). Assigned operators (and related persons) are assessed annual premiums for each retiree (and their dependents) assigned to them under a three-tier allocation system set out in the Coal Act. *Id.* at §§ 9704(a)(1), 9706(a)(1)-(3). So that assignments would be completed

[1] Because the vast majority of beneficiaries are also eligible for the federal Medicare program, the Combined Fund essentially functions as a "Medigap" policy, providing prescription drugs and other benefits not available under Medicare.

before the beginning of the plan's first full year commencing October 1, 1993, *see id.* at § 9702(c), Congress specifically directed that "the Commissioner of Social Security *shall*, before October 1, 1993, assign each coal industry retiree who is an eligible beneficiary to a signatory operator which (or any related person with respect to which) remains in business." *Id.* at § 9706(a) (emphasis added).[2]

To ensure the assignment of beneficiaries by the statutory deadline, Congress directed the 1950 and 1974 plans to provide to SSA within 20 days of the statute's enactment a list of the names and social security numbers of each eligible beneficiary (including each deceased beneficiary if any other individual was a beneficiary by reason of a relationship to such deceased beneficiary) and, to the extent possible, the names of their former employers. *See id.* at § 9706(c). Congress also directed all other agencies to cooperate fully with SSA in providing information which would enable SSA to complete the assignment process. *See id.* at § 9706(d). As the Government explains, at the outset, approximately 80,000 retirees needed to be assigned. *See* Pet. 8 n.4. Members of the Bituminous Coal Operators' Association subsequently provided SSA with a list of coal operators who voluntarily acknowledged responsibility for about 15,000 retirees. *Id.*

That left SSA with about 65,000 retirees to assign. Because only those retirees (and their dependents) actually receiving benefits under the 1950 and 1974 plans as of July 20, 1992, were eligible for enrollment in the Combined Fund, *see* 26 U.S.C. § 9703(e), the identity of those retirees

[2] The Coal Act was enacted on October 24, 1992. *See* note following 26 U.S.C. § 9701. The Social Security Administration ("SSA") thus had nearly a full year to complete the assignment process. Financing for the Combined Fund's first plan year, which ran from February 1, 1993 to September 30, 1993, was provided by other sources. *See* Pet. 8 n.3.

was known to SSA at the start of the assignment process. Not surprisingly, then, on September 9, 1993—only weeks before the statutory deadline—the then-Acting Commissioner of SSA informed a congressional committee that SSA "[was] making excellent progress with the assignment process," and that SSA "fully expect[ed] [to] meet [its] statutory responsibility to * * * complete the assignment process by October 1, 1993." *Provisions Relating to the Health Benefits of Retired Coal Miners: Hearing Before the House Ways and Means Comm.*, 103d Cong. 26 (1993) (statement of Acting Social Security Commissioner Lawrence H. Thompson).

Congress recognized that not all beneficiaries could be assigned under the criteria set out in the Act. The statute thus contemplates that such beneficiaries would be considered "unassigned," *see* 26 U.S.C. § 9704(a)(3), (d),[3] and designates sources of financing for their health benefits. For each of the plan's first three years, Congress directed that $70 million be transferred from the 1950 UMWA Pension Plan, and that a portion of those transfers be used to finance the health benefits of unassigned beneficiaries. *See id.* at § 9705(a)(1), (3). For each plan year thereafter, Congress authorized the annual transfer of interest earned by the Department of the Interior's Abandoned Mine Reclamation Fund (the "AML Fund") to be used to finance the health benefits of unassigned beneficiaries. *See id.* at

[3] The Act does not explicitly state that beneficiaries not assigned by October 1, 1993, are deemed "unassigned." Nor does the Act explicitly state that beneficiaries not assigned under the statute's three-tier allocation system are deemed "unassigned." Yet in providing for an "unassigned beneficiaries premium," 26 U.S.C. § 9704(d), and in designating sources of financing to reduce that premium, *id.* at §§ 9704(a)(3), 9705(a)(1), (3), (b)(1), (2), Congress clearly anticipated that there would be beneficiaries who could not be assigned in accordance with the Act's criteria.

§ 9705(b)(1), (2); 30 U.S.C. § 1232(h).[4] To the extent such transfers prove insufficient to cover the costs of providing health benefits to unassigned beneficiaries, the Act provides for the assessment of an unassigned beneficiaries premium against each assigned operator based on its proportionate share of assigned beneficiaries. 26 U.S.C. § 9704(a)(3), (d). To date, such transfers have been sufficient, and assigned operators have never been assessed an unassigned beneficiaries premium.

REASONS FOR DENYING THE WRIT

I. THE CONFLICT BETWEEN THE DECISIONS OF THE SIXTH AND FOURTH CIRCUITS DOES NOT WARRANT THIS COURT'S REVIEW.

1. The conflict between the decisions below and the decision issued by a divided panel of the Fourth Circuit in *Pardee* does not warrant this Court's review. Under either court's interpretation of the Coal Act, coal industry retirees (and their dependents) will continue to receive the same health benefits they have been receiving under the Combined Fund. Indeed, beneficiaries deemed "unassigned" under the Sixth Circuit's decisions will be entitled to the same benefits they would have received had they been "assigned." *See id.* at § 9703(a). Thus, the conflict in no way undermines Congress's primary objective in enacting the Coal Act—the continued provision of health benefits to retired mine workers. *See supra* at 3. Accordingly, there is no compelling need in this case for this Court's intervention.

[4] Such transfers may not exceed actual expenditures on behalf of unassigned beneficiaries. *See* 30 U.S.C. § 1232(h)(3)(A). To the extent interest earned by the AML Fund in any fiscal year is less than $70 million, Congress has authorized the transfer of interest earned by the Fund between September 30, 1992, and October 1, 1995, to make up the difference. *See id.* at § 1232(h)(2)(A), (B), (3)(B).

The Government contends that review is necessary because the Sixth Circuit's interpretation of the Coal Act "threatens to erode the financial stability of the Combined Fund." Pet. 24. To the contrary, the Combined Fund does not stand to lose *any* net revenue as a result of the Sixth Circuit's decisions, even if implemented on a nationwide basis. Congress has designated two sources of financing for the health benefits to unassigned beneficiaries: (1) a portion of the $210 million in transfers from the 1950 UMWA Pension Plan, and (2) for plan years beginning on or after October 1, 1995, annual transfers of interest earned by the AML Fund. *See* 26 U.S.C. § 9705(a)(1), (3), (b)(1), (2); 30 U.S.C. § 1232(h). Since the enactment of the Coal Act, those transfers have been sufficient to cover the costs of providing health benefits to unassigned beneficiaries, and they should continue to prove sufficient to do so as the overall beneficiary population continues to decline.[5]

---

[5] The Government suggests that transfers from the AML Fund may not be sufficient to cover such costs in the future as a result of falling interest rates and rising health care costs. *See* Pet. 27 & n.20. But such trends (assuming they persist) are likely to be offset by the continuing and rapid decline of the beneficiary population. At its inception, the Combined Fund had approximately 114,000 beneficiaries. Pet. 25 & n.17. According to information contained in recent invoices and worksheets sent out by the Fund, as of October 2001, the Fund had approximately 54,000 beneficiaries—less than half the number it had only nine years ago. *See also* 146 Cong. Rec. S3835 (May 10, 2000) (statement of Sen. Rockefeller) ("There are now only about 65,000 miners and retirees remaining in the [Combined] Fund * * *. Their average age is 78 years old, and more than 45% of the population is over 80 years."). And although the Government contends (Pet. 25-26) that the invalidation of assignments made after the statutory deadline could require the Combined Fund to issue refunds of premiums collected in prior years, there is no indication in the petition that transfers from the AML Fund cannot make up the difference.

The Sixth Circuit's decisions thus hardly threaten the Fund's financial collapse.[6]

The Government also contends (Pet. 24) that review is warranted because other assigned operators may be required to absorb some of the costs of providing benefits to beneficiaries who were assigned on or after October 1, 1993. To date, however, assigned operators have never been assessed

---

The Government also suggests (Pet. 27-28) that it would be inappropriate to use transfers from the AML Fund to finance the provision of health benefits to beneficiaries who could not be assigned by October 1, 1993, because that fund was established for other purposes. But the transfers authorized under the Coal Act are transfers of *interest* earned by the AML Fund, and thus do not jeopardize the fund's viability. And, in any event, Congress has determined that such transfers are an appropriate source of financing for the Combined Fund.

[6] Although the Government suggests (Pet. 26-27 n.20) that the Sixth Circuit's decisions will exacerbate operating shortfalls the Combined Fund is apparently expected to encounter in future years, an increase in the number of unassigned beneficiaries would actually have no effect on such shortfalls, since the Coal Act provides for the financing of health benefits for unassigned beneficiaries. In fact, the Combined Fund realizes a net gain when an assigned beneficiary is allocated to the unassigned beneficiary pool, because transfers from the AML Fund have covered actual *expenditures* on behalf of unassigned beneficiaries, not just premiums. *See* Office of Surface Mining Reclamation and Enforcement, United States Dep't of Interior, *Memorandum of Understanding Between the Office of Surface Mining Reclamation and Enforcement of the United States Dep't of Interior and the United Mine Workers of America Combined Benefit Fund* 4 (Nov. 6, 1996). To the extent the Combined Fund experiences operating shortfalls, it is because actual expenditures on behalf of *assigned* beneficiaries exceed premiums collected on their behalf. *See* Letter from Gloria L. Jarmon, United States General Accounting Office, to the Honorable William V. Roth, Jr. 3 (Table 1) (Aug. 31, 2000).

an unassigned beneficiaries premium. And even if they were required to shoulder some of those costs, that would hardly necessitate this Court's review. The Coal Act does not create a scheme of perfect symmetry in which companies are required to finance the costs of providing benefits to only those beneficiaries with whom they had a former employment relationship or for whose benefits they are most responsible. Instead, Congress established a scheme where a coal operator that only briefly employed a retiree who worked much longer for another coal operator might be responsible for that retiree (and his dependents), *see* § 9706(a); where companies that never employed a retiree or even engaged in the coal mining business might be responsible for retirees, *see* §§ 9701(c)(2)(A), 9706(a); and where companies might be responsible for a portion of the costs of providing benefits to retirees who could not be assigned to anyone else. *See* § 9704(a)(3), (d). Requiring assigned operators to bear a portion of the costs of providing benefits to beneficiaries who could not be assigned by October 1, 1993, is consistent with this "rough justice" approach. *See Pardee*, 269 F.3d at 439 (Niemeyer, J., dissenting) (criticizing majority for "seek[ing] to adjust the financial equities of the Coal Act by judicial mandate").[7]

The relatively insignificant and declining number of beneficiaries implicated by the conflict also makes this case an unattractive candidate for certiorari. As the Government explains (Pet. 24-25), approximately 7,500 retirees were initially assigned by SSA after the statutory deadline.

[7] It is by no means certain that the invalidation of assignments made on or after October 1, 1993, would necessarily result in a "windfall" for an operator whose assignments are invalidated. *See* Pet. 23. If an unassigned beneficiaries premium is assessed against assigned operators, it is conceivable that some operators whose assignments were invalidated would be required to pay more to the Fund than they would if assignments made after the statutory deadline were valid.

Assuming that the number of those beneficiaries has declined at the same rate as the general beneficiary population, less than 3,750 of those retirees are still receiving benefits under the Fund. Even if the Government is correct that each retiree assigned under the Coal Act accounts for approximately 1.4 beneficiaries, *see* Pet. 25 n.17, that means that only about 5,250 beneficiaries assigned after October 1, 1993, are still receiving benefits under the Combined Fund—less than 10% of the Fund's current beneficiaries. *See supra* at 8 n.5. And many of those beneficiaries may be rendered "unassigned" in any event as a result of this Court's decision in *Eastern Enterprises* v. *Apfel*, 524 U.S. 498 (1998). *See* Pet. 6 n.1; *Agency Management of the Implementation of the Coal Act: Hearing Before the Subcomm. on Government Oversight, Management, and Restructuring, and the District of Columbia of the Senate Governmental Affairs Comm.*, 105th Cong. 62-63 (1998) (statement of Marilyn O'Connell, SSA Associate Commissioner for Program Benefits) (as of October 1998, over 6,000 assigned retirees redesignated as "unassigned" as a result of *Eastern Enterprises* decision).[8]

In short, the conflict between the decisions of the Sixth and Fourth Circuits is certainly one the Nation and this Court can tolerate. The conflict does not concern issues of constitutional importance like those involved in *Eastern Enterprises*, where the Court concluded that the assignment of retirees under the third tier of the Coal Act's allocation system placed a "severe, disproportionate, and extremely retroactive burden" on assigned operators. 524 U.S. at 538. Quite the opposite. The conflict merely concerns an issue of statutory interpretation that does not hinder the effective administration of the statute, does not unfairly burden private parties, and does not promise to be one of continuing importance.

[8] Indeed, as the Government notes (Pet. 12 n.8), all of the 50-plus assignments challenged in *Dixie Fuel* were subsequently voided as a result of *Eastern Enterprises*.

2. Even if the conflict somehow merited this Court's attention, there is no need for the Court to intervene now. To begin with, the Court can wait and see if any of the dire consequences envisioned by the Government indeed come to pass. As discussed further below, there are a number of cases in the lower courts raising the question presented which could provide the Court with the opportunity to visit the issue at a later date. Moreover, should the Court deny certiorari at this time, it is entirely possible that the conflict will resolve itself.

The current conflict exists only between the Sixth and the Fourth Circuits. At the time the Sixth Circuit decided *Dixie Fuel*—and at the time the Sixth Circuit denied initial hearing en banc in the decisions below, *see* Pet. 15—the court did not have the Fourth Circuit's decision in *Pardee* before it. Moreover, other circuits will continue to weigh in on the question presented, making it possible that either the Sixth or Fourth Circuit will reconsider its ruling. In fact, the Third Circuit recently heard argument in a case concerning the question presented, and a decision should issue soon. *See Shenango, Inc.* v. *Commissioner of Soc. Sec.*, No. 00-2525 (3d Cir.) (argued Sept. 19, 2001).[9]

At the very least, denying certiorari now would allow further development of the law, which would benefit this Court

[9] Other circuits are also likely to weigh in, as the Coal Act provides that venue is appropriate in "the district where the plan is administered or where a defendant resides or does business." 29 U.S.C. § 1451(d). *See* 26 U.S.C. § 9721 (stating that "[t]he provisions of section 4301 of [ERISA] shall apply to any claim arising out of an obligation to pay any amount required to be paid" under the Coal Act). The "district where the plan is administered" is the District of Columbia. *See Holland* v. *King Knob Coal Co.*, 87 F. Supp. 2d 433, 440 (W.D. Pa. 2000). At least two cases raising the question presented are pending in that district. *See Nell Jean Indus., Inc.* v. *Barnhardt*, No. 01-CV-2006 (D.D.C.); *Elgin Nat'l Indus.* v. *Halter*, No. 01-CV-397 (D.D.C.).

should it decide to take up the question presented at a later date. *See, e.g.*, *Arizona* v. *Evans*, 514 U.S. 1, 23 n.1 (1995) (Ginsburg, J., dissenting) ("We have in many instances recognized that when frontier legal problems are presented, periods of 'percolation' in, and diverse opinions from, state and federal appellate courts may yield a better informed and more enduring final pronouncement by this Court.").

II. THE SIXTH CIRCUIT'S INTERPRETATION OF THE COAL ACT IS CONSISTENT WITH THIS COURT'S PRECEDENTS.

The Sixth Circuit's interpretation is correct and consistent with this Court's precedents. If left to stand, the Sixth Circuit's decisions—which give effect to Congress's intent—may well be implemented by SSA on a nationwide basis, thereby mooting the conflict as a practical matter.

This Court has held that if a statute does not specify a consequence for an agency's noncompliance with a statutory deadline, federal courts will not in the ordinary course conclude that an agency lacks authority to act beyond the deadline. *See, e.g.*, *United States* v. *James Daniel Good Real Property*, 510 U.S. 43, 63 (1993). At the same time, however, this Court has specifically declined to hold that the consequence of noncompliance must be stated *explicitly* in the statute. *See Brock* v. *Pierce County*, 476 U.S. 253, 262 n.9 (1986). Indeed, in determining whether an agency may act outside statutorily prescribed limits, the Court has looked to "normal indicia of congressional intent." *Id.* *See also James Daniel Good*, 510 U.S. at 65 (examining structure of timing provisions in statute); *United States* v. *Montalvo-Murillo*, 495 U.S. 711, 719 (1990) (examining design and function of statute).

As the Sixth Circuit recognized in *Dixie Fuel*, "the entire statutory scheme for assigning beneficiaries and financing the Combined Benefit Fund reflects Congress's intent that all assignments be completed by October 1, 1993." Pet. App.

45a. For instance, as discussed, the Act contemplates that beneficiaries who could not be assigned under the criteria set out in the Act would be considered "unassigned." *See supra* at 6. Moreover, as the Sixth Circuit explained, "the calculation of the obligation of every assigned operator for payment of unassigned beneficiary premiums is dependent upon the completion of the assignment of beneficiaries by October 1, 1993." Pet. App. 47a. The Government argues that each assigned operator's proportionate share of unassigned beneficiaries is "not fixed in concrete," but rather subject to adjustment to reflect "changed circumstances." Pet. 21. But the Coal Act specifies only *two* circumstances requiring the redetermination of an assigned operator's proportionate share for plan years beginning on or after October 1, 1994: (1) where changes in assignments occur as a result of the appeals process set out under § 9706(f), and (2) where an assigned operator or related person ceases to do business. 26 U.S.C. § 9704(f)(2)(A), (B). Nowhere does the Act state that an assigned operator's proportionate share may be adjusted to reflect the initial assignment of beneficiaries after October 1, 1993, for the simple reason that the Act does not contemplate initial assignments after that date. Rather, the Act plainly contemplates that beneficiaries who could not be assigned by October 1, 1993, would be considered "unassigned." That is "[t]he consequence flowing from the failure of [SSA] to make those assignments before October 1, 1993." Pet. App. 47a.

It is no answer that Congress did not *explicitly* state that beneficiaries who could not be initially assigned by that date would be considered "unassigned." Congress did not explicitly state that beneficiaries who could not be assigned under the Act's three-tier allocation system would be deemed "unassigned" either, but no one would argue otherwise. That is because Congress clearly anticipated that some beneficiaries would be unassigned and made provisions for them. *See* 26 U.S.C. § 9704(a)(3), (d). Thus, the most natural

reading of the statute is that beneficiaries who could not be assigned under the Act's three-tier system by October 1, 1993, are deemed "unassigned." Such a deadline makes sense, because Congress may not have wanted SSA to go to extraordinary lengths in an attempt to assign every single beneficiary—particularly under a statutory scheme already suffused with concepts of rough justice. Even though Congress may have hoped to identify the "persons most responsible for plan liabilities," Pub. L. No. 102-486, § 19142(a)(2), 106 Stat. 3037, Congress may have decided that if it were too difficult to do so in each case by the statutory deadline, then the trouble of making such assignments would not be worth the further expenditure of public resources beyond that date.[10]

The Government's arguments to the contrary cannot withstand scrutiny. For instance, the Government argues (Pet. 17-18) that the Coal Act cannot be read to divest the Commissioner of authority to make initial assignments after October 1, 1993, because the statute does not impose a "consequence" upon SSA for failing to complete assignments by that date. According to the Government, no "punishment" for missing the statutory deadline could be visited upon SSA because the agency does not "enforce" the Act. Pet. 17. But this Court's precedents do not hold that an agency must be "punished" for missing a deadline, only that the statute must specify the consequence of the agency's failure to act within the time prescribed. Here, that consequence is quite clearly

---

[10] Although the Government points out that Congress provided in a supplemental appropriation for SSA that the amount would remain available "until expended," Pet. 20, that appropriation was intended to enable SSA not only to make initial assignments, but also to "calculate the initial health-benefit premium" and to "review assignments on requests for reconsideration," Pet. 9, endeavors which—unlike making initial assignments—would continue past the statutory deadline.

treating those not assigned by the statutory deadline pursuant to the express rules for unassigned beneficiaries.

The Government also argues (Pet. 18) that the Sixth Circuit's reading of the Coal Act has adverse consequences for the AML Fund and other assigned operators. As discussed, however, Congress has limited annual transfers from the AML Fund to *interest* earned by the fund, and such transfers do not pose any threat to the fund's viability. And if such transfers continue to prove sufficient to cover the costs of providing health benefits to unassigned beneficiaries, then assigned operators will not be assessed an unassigned beneficiaries premium. But even if such transfers were to prove insufficient, it would not be overly burdensome to require other assigned operators to bear a portion of those costs. *See supra* at 9-10.

The Government further contends (Pet. 19) that the Sixth Circuit's reading of the Coal Act is inconsistent with Congress's decision to impose liability on "related persons." According to the Government, that aspect of the statutory scheme required SSA "to trace many complex changes in business ownership and control," and information was not available from a "single, central depository," but rather was "pieced together" from several sources. *Id.* Thus, the Government concludes, "[i]t is scarcely conceivable that Congress would have imposed an absolute 'jurisdictional' bar on the ability of [SSA] to complete that undertaking when, in a significant number of cases, decisions depended on information that was not within [SSA's] possession when the Coal Act was passed." *Id.* But that argument in fact proves too much. Congress's decision to impose liability on related persons demonstrates that it was willing to impose liability on entities even if they were not the "persons most responsible for plan liabilities." Pub. L. No. 102-486, § 19142(a)(2), 106 Stat. 3037. Moreover, as discussed, Congress may have decided that if certain assignments were too difficult to complete—because, for example, they required SSA "to trace many complex changes in business ownership and control"—by October 1, 1993, then further resources should not be expended.

Finally, the Government asserts (Pet. 21) that to the extent the Coal Act is ambiguous, SSA's interpretation of the statute is entitled to deference. Even if the Act were ambiguous—which it is not—no deference should be accorded SSA's interpretation. Not only is the statutory text devoid of support, but the agency's interpretation of the Act is directly at odds with its original understanding of its statutory mandate—that initial assignments had to be completed by October 1, 1993.

In SSA's only Coal Act rulemaking in 1993, the agency described its mission as a "one-time assignment activity which *must* be completed before October 1, 1993." 58 Fed. Reg. 52,914, 52,914 (Oct. 13, 1993) (emphasis added). In June 1995, the Principal Deputy (and former Acting) Commissioner of SSA informed a congressional oversight committee that SSA had "carried out [its] responsibilities of calculating the premiums and the initial assignment to the mine operators in the timeframe contemplated by the statute." *Coal Industry Retiree Health Benefit Act of 1992: Hearing Before the Subcomm. on Oversight of the House Ways and Means Comm.*, 104th Cong. 20 (1995) (statement of Principal Deputy Commissioner Lawrence H. Thompson).

The agency's shifting position on its authority under the Coal Act is not entitled to deference. *See INS* v. *Cardoza-Fonseca*, 480 U.S. 421, 446 n.30 (1987) ("An agency interpretation * * * which conflicts with the agency's earlier interpretation is 'entitled to considerably less deference' than a consistently held agency view.") (quoting *Watt* v. *Alaska*, 451 U.S. at 273).

CONCLUSION

For the foregoing reasons, the petition should be denied.

Respectfully submitted,

JOHN R. WOODRUM
W. GREGORY MOTT
HEENAN, ALTHEN & ROLES LLP
1110 Vermont Avenue, N.W.
Suite 400
Washington, D.C. 20005
(202) 887-0800

JOHN G. ROBERTS, JR.*
LORANE F. HEBERT
HOGAN & HARTSON L.L.P.
555 Thirteenth Street, N.W.
Washington, D.C. 20004
(202) 637-5810

*Counsel of Record

Counsel for Respondents

REPLY

BRIEF

TABLE OF AUTHORITIES

Cases:	Page
Brock v. *Pierce County*, 476 U.S. 253 (1986)	7, 9
Codell Constr. Corp. v. *Massanari*, No. 00-271 (E.D. Ky. May 15, 2001), appeal pending, No. 01-5909 (6th Cir.)	2
Dixie Fuel Co. v. *Commissioner of Social Security*, 171 F.3d 1052 (6th Cir. 1999)	2, 3
Eastern Enterprises v. *Apfel*, 524 U.S. 498 (1998)	6
Holland v. *Pardee Coal Co.*, 269 F.3d 424 (4th Cir. 2001)	1, 7, 9
Mead Corp. v. *Apfel*, 128 F. Supp. 2d 1096 (S.D. Ohio 2001), appeal pending, No. 01-3277 (6th Cir.)	2
United States v. *James Daniel Good Real Property*, 510 U.S. 43 (1993)	8
United States v. *Montalvo-Murillo*, 495 U.S. 711 (1990)	6, 7, 9
Statutes and regulations:	
Coal Industry Retiree Health Benefit Act of 1992, 26 U.S.C. 9701 *et seq.*	1
26 U.S.C. 9701(c)(2)(A)	5
26 U.S.C. 9704(a)	5
26 U.S.C. 9706(a)	6
26 U.S.C. 9706(f)	8
Energy Policy Act of 1992, Pub. L. No. 102-486, Tit. XIX, 106 Stat. 3012:	
§ 19142(a)(2), 106 Stat. 3037	3-4
§ 19142(b)(3), 106 Stat. 3037	5
28 U.S.C. 1391(e)	2

In the Supreme Court of the United States

No. 01-705

JO ANNE B. BARNHART, COMMISSIONER OF SOCIAL SECURITY, PETITIONER

v.

PEABODY COAL COMPANY, ET AL.

JO ANNE B. BARNHART, COMMISSIONER OF SOCIAL SECURITY, PETITIONER

v.

BELLAIRE CORPORATION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

REPLY BRIEF FOR THE PETITIONER

1. Respondents concede (Peabody Br. in Opp. 7; Bellaire Br. in Opp. 4) that the Sixth Circuit's decisions below are in direct conflict with the Fourth Circuit's decision in *Holland* v. *Pardee Coal Co.*, 269 F.3d 424 (2001), which upheld the authority of the Commissioner of Social Security under the Coal Industry Retiree Health Benefit Act of 1992 (Coal Act), 26 U.S.C. 9701 *et seq.*, to make initial assignments of beneficiaries of the United Mine Workers of America Combined

Benefit Fund (Combined Fund) to signatory operators on or after October 1, 1993. Despite their acknowledgment of the division in appellate decisions on that question, respondents contend that the conflict does not warrant resolution, at least at this time, because (a) the conflict at present involves only two circuits; (b) the issue concerns the financing of the benefits of only a minority of Combined Fund beneficiaries; and (c) even if petitioners and other signatory operators similarly situated to them are absolved of the obligation to pay for the health care costs of those beneficiaries, the Combined Fund can find the money to cover those costs elsewhere. Those submissions are wide of the mark.

a. The conflict between the Sixth and Fourth Circuits is real and important. More than half of the companies that were assigned responsibility for miners on or after October 1, 1993, are located in those Circuits. See Pet. 23-24. Thus, while other courts of appeals may eventually rule on the question presented here as well, that is no warrant for delay in this Court's resolution of the issue presented when the conflicting decisions already govern most of the cases that might be brought concerning this issue.[1]

---

[1] In addition, some signatory operators that do not reside within the Sixth Circuit have attempted to gain the benefit of that Circuit's decision in *Dixie Fuel Co.* v. *Commissioner of Social Security*, 171 F.3d 1052 (1999), by joining litigation brought within the Sixth Circuit by operators that do reside there. Those non-resident operators have argued that, even though venue would not be proper in the Sixth Circuit if the litigation were brought by them alone, venue is proper under 28 U.S.C. 1391(e)—which permits an action to be brought against a federal agency in the district where "the plaintiff resides"—as long as any plaintiff resides in the district where the litigation is brought. See *Mead Corp.* v. *Apfel*, 128 F. Supp. 2d 1096 (S.D. Ohio 2001), appeal pending, No. 01-3277 (6th Cir.); *Codell Constr. Corp.* v. *Massanari*, No. 00-271 (E.D. Ky. May 15, 2001), appeal pending, No. 01-5909 (6th Cir.). Thus, the Sixth Circuit's decision in *Dixie Fuel*, to which that court adhered here, is having a distorting effect on the resolution of Coal Act claims.

Nor, contrary to respondents' speculation, is there any reason to believe that either the Sixth or the Fourth Circuit will change its position in future cases. The Sixth Circuit has already twice denied the government's effort to obtain reconsideration of the issue by the full court—first, when the government sought rehearing en banc of that court's decision in *Dixie Fuel Co.* v. *Commissioner of Social Security*, 171 F.3d 1052 (1999); and again, when the government sought initial en banc hearing in these cases, in which it acknowledged the binding authority of *Dixie Fuel* in the Sixth Circuit but again submitted that *Dixie Fuel* was incorrectly decided and should be reconsidered. See Pet. 12 n.8, 15. The Fourth Circuit also denied the operator's request for rehearing en banc of its decision in *Pardee*, even though it was aware of the Sixth Circuit's conflicting decision in *Dixie Fuel*. See Pet. 22 n.14. Accordingly, there is scant likelihood that the Fourth and Sixth Circuits will resolve their conflicting decisions in the absence of this Court's review.

b. Respondents submit that review is not warranted because the Combined Fund will be able to look to other sources of revenue—namely, transfers of interest from the Department of the Interior's Abandoned Mine Land Reclamation (AML) Fund and an additional unassigned-beneficiary premium from all signatory operators—to make up for the shortfall of funds resulting from the fact that signatory operators like respondents will not be required to finance the health-care costs of their own employees. See Peabody Br. in Opp. 8-9. But even if the survival of the Combined Fund is not placed in immediate peril by the decisions below, the Sixth Circuit's decisions nonetheless warrant review, because identifying the proper entity that is responsible for financing a Combined Fund beneficiary's health care costs is fundamental to the functioning of the Coal Act. One of Congress's stated objectives in the Coal

Act was "to identify persons most responsible for plan liabilities in order to stabilize plan funding and allow for the provision of health care benefits to such retirees." Energy Policy Act of 1992, Pub. L. No. 102-486, Tit. XIX, § 19142(a)(2), 106 Stat. 3037.

Indeed, in *Barnhart* v. *Sigmon Coal Co.*, No. 00-1307 (argued Nov. 7, 2000), this Court granted certiorari to resolve a conflict among the circuits on an issue of statutory interpretation concerning the proper entity to be made responsible for the health care costs of Combined Fund beneficiaries, even though in that case, as in this one, the beneficiaries' continued receipt of benefits was not immediately dependent on the outcome of the case. In *Sigmon*, the courts of appeals were divided as to whether the direct successor in interest of a signatory operator could be made responsible for the health care costs of the signatory's retired employees if the signatory was no longer in business. If a successor in interest cannot be made responsible for the signatory's employees, then the cost of financing those retirees' benefits passes either to another entity in a lower tier under the Coal Act's assignment-priority system, to the AML fund, or to all signatory operators (on a *pro rata* basis) by means of an unassigned-beneficiary premium. See Pet. 5-6. Thus, as in this case, the immediate question in *Sigmon* is who shall pay for the retirees' benefits, not whether retirees shall receive benefits at all. Nonetheless, by granting certiorari in *Sigmon*, the Court recognized that the proper *allocation* of financial responsibility for Coal Act benefits is an important matter warranting this Court's review, at least where (as here and in *Sigmon*) two courts of appeals have reached opposing conclusions in published decisions.

It is hardly sufficient to assert, as respondents do (see Peabody Br. in Opp. 10), that the Coal Act does not require a perfect match between each retired coal miner and the signatory operator that actually employed that miner. Congress did recognize that the signatory operator that had employed the miner might no longer be in existence or might not have sufficient assets to pay for the miner's benefits, and so Congress made provision for the Commissioner and the Combined Fund to look to the signatory operator's "related persons" in such circumstances. See 26 U.S.C. 9701(c)(2)(A), 9704(a). But Congress did not intend that a signatory operator that had actually employed a beneficiary of the Combined Fund and was still in business and solvent should be able to force responsibility for its own employees onto other, unrelated operators and the public at large. To the contrary, that is exactly the kind of maneuver that precipitated the crisis in the predecessor health-care trusts for coal industry retirees, and that led Congress to enact the Coal Act. See Pet. 4.

Moreover, respondents simply disregard the fact that Congress expressly intended the Combined Fund to operate as a "privately financed self-sufficient program." Pub. L. No. 102-486, § 19142(b)(3), 106 Stat. 3037. In establishing the Combined Fund, Congress rejected proposals that the government undertake the burden of financing retired miners' benefits. Rather, Congress made transfers of interest from the AML Fund available only as a back-up to ensure that "orphan" retirees whose employers (and all related persons) had gone out of business would not be deprived of their benefits. The assignments at issue in these cases do not involve such "orphan" retirees. Rather, they involve miners who worked *for respondents* (or their related companies). By allowing respondents to shift responsibility for their retirees to the government, the Sixth Circuit's decisions contravene the "pay for your own" principle on which the Coal Act's assignment-priority system is based, and undermines Congress's intent that the Combined Fund be financed, to the extent possible, from private sources.

Respondents Peabody *et al.* argue (Br. in Opp. 10-11) that this case does not warrant review because the issue prospectively affects financing of benefits for only ten percent of the Combined Fund's beneficiaries. But as Peabody's own figures demonstrate, the total number of assignments potentially affected by this issue (about 7500 retirees, plus their dependents) is *greater* than the number of assignments (about 6000) affected by this Court's decision in *Eastern Enterprises* v. *Apfel*, 524 U.S. 498 (1998), and it is probably on a par with, or greater than, the number of assignments potentially at issue in *Barnhart* v. *Sigmon Coal Co.*, No. 00-1307 (argued Nov. 7, 2000). Moreover, the financial impact of this issue on the Combined Fund is not limited to future years—although that impact is considerable, especially since we are informed that the Combined Fund is expected to pay for health care costs for some beneficiaries for 30 years. The Sixth Circuit's reading of the Coal Act, if applied nationwide, could require the Combined Fund to make refunds to signatory operators, or to provide them credit against premiums in future years, reflecting the premiums that were assessed in *past* years for beneficiaries assigned after October 1, 1993, even if those beneficiaries are now deceased. The total net amount of such refunds and credits for past years could exceed $57 million. See Pet. 26 n.18.

2. Respondents argue that, because the Coal Act provided that the Commissioner "shall, before October 1, 1993," make the initial assignments of Combined Fund beneficiaries to a signatory operator, see 26 U.S.C. 9706(a), the Commissioner lost all authority to make initial assignments after that date. See Bellaire Br. in Opp. 6-7. That contention is incorrect. As this Court explained in *United States* v. *Montalvo-Murillo*, 495 U.S. 711, 718 (1990), "Congress' mere use of the word 'shall' [is] not enough to remove the [agency's] power to act." At issue here is not whether

Congress's use of the word "shall" placed the Commissioner under a statutory duty to complete the assignment process by October 1, 1993; rather, the question is what consequence should flow from the Commissioner's failure to satisfy that duty in full.[2] Respondents maintain that, because the Commissioner was unable to make all the assignments in time, the beneficiaries who were not assigned by October 1, 1993, should in effect become a public charge or the responsibility of other, unrelated entities rather than the responsibility of the signatories that actually employed them (or their related entities). That proposition "is not, to say the least, of the sort that commands instant assent." *Brock* v. *Pierce County*, 476 U.S. 253, 258 (1986).[3]

Respondents maintain that the Coal Act itself makes clear that the "consequence" of the Commissioner's failure to make a timely assignment of a beneficiary is that the beneficiary shall be deemed "unassigned." See Peabody Br. in Opp. 15-16; Bellaire Br. in Opp. 7-9. But the consequence that, under respondents' submission, would follow from the Commissioner's failure to complete all initial assignments by

---

[2] Thus, respondents Bellaire *et al.* err in arguing (Br. in Opp. 7, 10) that our argument renders Congress's use of the word "shall" superfluous. As this Court explained in *Montalvo-Murillo*, where it rejected the same argument, the existence of the duty and the consequence (if any) of the agency's failure to satisfy that duty are two separate questions. In many circumstances, "[a]lthough the duty is mandatory, the sanction for breach is not loss of all later powers to act." 495 U.S. at 718. See also *Pardee*, 269 F.3d at 433 (ruling, contrary to Sixth Circuit, that Congress's use of the word "shall" "is insufficient evidence to establish that Congress intended such a textual provision to be jurisdictional").

[3] Respondents Peabody *et al.* erroneously argue (Br. in Opp. 5 n.2) that the Commissioner had almost a year in which to complete the assignment process. In fact, as we have noted (Pet. 9), Congress did not provide SSA with appropriations for the assignment process until less than three months before October 1, 1993— leaving SSA about 88 days in which to make almost 65,000 assignments (see Pet. 8 n.4).

October 1, 1993, would be a jurisdictional limit on the Commissioner's authority to act in the public interest after that date to ensure that Combined Fund beneficiaries are properly assigned to their former employers. This Court's decisions make clear that a court should not impose such a limit on a federal agency's authority absent the most clear indication in the statute that Congress intended such a bar to be applied. See *United States* v. *James Daniel Good Real Property*, 510 U. S. 43, 63 (1993).

The Coal Act in any event does not provide, either in terms or implicitly, that a beneficiary should be deemed "unassigned" because the Commissioner was unable to determine whether he should be assigned to a signatory operator *before October 1, 1993*. Rather, it (implicitly) provides only that a beneficiary shall be deemed unassigned if the Commissioner is unable to assign the beneficiary to a signatory operator *at all*. Thus, the Act makes clear that if SSA learns, on administrative reconsideration of an assignment decision after October 1, 1993, that a beneficiary should have been assigned to another operator, the Commissioner may make the reassignment to the proper operator. See 26 U.S.C. 9706(f). The Commissioner is not required to treat such a beneficiary as unassigned (and therefore a public charge, or, potentially, the responsibility of unrelated operators) in the face of evidence clearly establishing that, under the Coal Act's criteria, the beneficiary should be assigned to a particular operator. The same is true in this case. The Coal Act does not require the Commissioner to accept the erroneous treatment of a beneficiary as unassigned merely because the evidence showing that the beneficiary should be assigned to a particular operator came to light or could be acted upon only after October 1, 1993.

As the Court stressed in *Pierce County* and *Montalvo-Murillo*, it is particularly inappropriate to treat a statutory requirement that an agency act within a certain time as a

jurisdictional bar to the agency's ability to act after that time when the public interest or the interests of innocent third parties would be adversely affected by such a bar. See *Montalvo-Murillo*, 495 U.S. at 720; *Pierce County*, 476 U.S. at 261-262. Those decisions make clear that the Sixth Circuit's reading of the Coal Act is in error. "[T]he protection of the public fisc is a matter that is of interest to every citizen," *Pierce County*, 476 U.S. at 262; but the Sixth Circuit's ruling would force the government (through the AML Fund) to bear the health care costs of retired miners that were actually employed by respondents. As the Fourth Circuit observed in *Pardee*, 269 F.3d at 437, nothing in the Coal Act suggests that Congress intended that coal mine operators obtain "a financial windfall * * * at the expense of other operators * * * and, more importantly, the public interest," simply because the Commissioner was unable to complete 65,000 assignments in less than three months.[4]

* * * * *

For the foregoing reasons, and for those set forth in the petition, the petition for a writ of certiorari should be granted.

---

[4] Respondents Peabody *et al.* argue (Br. in Opp. 16) that, because only interest from the AML Fund (and not principal) may be transferred to the Combined Fund, the Sixth Circuit's decision cannot jeopardize the core purpose of the AML fund, which is to ameliorate the adverse public health and safety consequences of surface coal mining. The interest that is transferred out of the AML Fund, however, is not available to restore lands subject to surface mining to their original contours. And given the decline in interest rates as well as the large sums of money potentially affected by the issue in this case (see Pet. 25-28), the Combined Fund may be required to impose an unassigned-beneficiary premium on signatory operators if the Sixth Circuit's reading of the Coal Act is upheld.

Respectfully submitted.

THEODORE B. OLSON
Solicitor General

JANUARY 2002

Supreme Court, U.S.
FILED
APR - 8 2002
OFFICE OF THE CLERK

(9) (9)

Nos. 01-705 and 01-715

In the Supreme Court of the United States

JO ANNE B. BARNHART, COMMISSIONER OF SOCIAL SECURITY, PETITIONER

v.

PEABODY COAL COMPANY, ET AL.

MICHAEL H. HOLLAND, ET AL., PETITIONERS

v.

BELLAIRE CORPORATION, ET AL.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

JOINT APPENDIX

THEODORE B. OLSON
Solicitor General
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217
Counsel of Record for Petitioner Commissioner of Social Security

PETER BUSCEMI
MORGAN, LEWIS & BOCKIUS
1800 M Street, N.W.
Washington, D.C. 20036
(202) 467-7190
Counsel of Record for Petitioners Trustees of UMWA Combined Benefit Fund

JOHN G. ROBERTS
HOGAN & HARTSON, L.L.P.
555 Thirteenth Street, N.W.
Washington, D.C. 20004
(202) 637-5810
Counsel of Record for Respondents Peabody Coal Co., et al.

JEFFREY S. SUTTON
JONES, DAY, REAVIS & POGUE
1900 Huntington Center
41 South High Street
Columbus, Ohio 43215
(614) 469-3855
Counsel of Record for Respondents Bellaire Corporation, et al.

PETITIONS FOR A WRIT OF CERTIORARI FILED: NOVEMBER 19, 2001
CERTIORARI GRANTED: JANUARY 22, 2002

BEST AVAILABLE COPY

197 PP
8 5/0

TABLE OF CONTENTS

Page

Peabody Coal Co., et al. v. *Barnhart*:

District court docket entries 1
Court of appeals docket entires 7
Complaint (Sept. 30, 1999) 10
Affidavit of Danny R. Moriarty, with attachments (Feb. 10, 2000) 25
Answer (Feb. 29, 2000) 48

Bellaire Corp., et al. v. *Barnhart, et al.*:

District court docket entries 56
Court of appeals docket entries 61
Complaint (June 4, 1999) 65
Declaration of Carl F. Tennille (Nov. 18, 1999) 92
Affidavit of Daniel J. Rolling, with attachments (Mar. 14, 2000) 95
Answer by Commissioner of Social Security (Nov. 3, 1999) 123
Affidavit of Michael D. Glass, with Exhibit 2-B (Mar. 29, 2000) 142
Answer by Trustees of UMWA Combined Fund (Apr. 7, 2000) 153
Attachment A to Commissioner's Memorandum in Opposition to Bellaire's Motion for Preliminary Injunction (May 1, 2000):
Correspondence from Social Security Administration 170
Declaraton of Richard Harron 179

NOTICE

The following items have been omitted in printing this appendix because they appear on the following pages in the printed appendix to the petition for a writ of certiorari in No. 01-705:

Peabody Coal Co., et al. v. *Barnhart*:

District Court Stipulation of Dismissal of Counts I-III Without Prejudice (Feb. 8, 2000) 9a
District Court Order Granting Summary Judgment to Peabody Respondents (Mar. 14, 2000) 7a
District Court Order dismissing count VI of Complaint with Prejudice (Apr. 13, 2000) 6a
Final Judgment of the District Court (July 11, 2000) 5a
Court of Appeals Order denying initial hearing en banc (Dec. 6, 2000) 26a
Decision of the Court of Appeals (June 21, 2001) 1a

Bellaire Corp., et al. v. *Barnhart, et al.*:

District Court Opinion Granting Summary Judgment to Bellaire respondents (June 30, 2000) 14a
Final Judgment of the District Court (June 30, 2000) .....
Court of Appeals Order denying initial hearing en banc (Dec. 6, 2000) 26a
Decision of the Court of Appeals (June 22, 2001) 3a

UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF KENTUCKY (OWENSBORO)

CIVIL DOCKET FOR CASE #: 99-CV-201

PEABODY COAL COMPANY; EASTERN ASSOCIATED COAL CORPORATION, PLAINTIFFS

v.

COMMISSIONER OF SOCIAL SECURITY, KENNETH S. APFEL, DEFENDANT

RELEVANT DOCKET ENTRIES

DATE	DOCKET NUMBER	PROCEEDINGS
9/30/99	1	COMPLAINT filed and (Summons(es)) issued) filing fee pd - receipt # 6619 (pmay) [Entry date 10/01/99]
9/30/99	2	ORDER eboc - case referred to Mag Judge E. R. Goebel for submission of findings of fact and conclusions of law and recommendations to the Court; answer and transcript due within 60 days after service of complaint; plaintiff granted 30 days thereafter to file statement of errors with fact and law summary; defendant

DATE	DOCKET NUMBER	PROCEEDINGS
		has 45 days thereafter to respond and file counter statement of fact and law; any request for oral argument should be incorporated in statement of specific errors; parties to comply as otherwise set forth; Case ready for submission 2/12/00 Ccs: counsel and Magistrate Judge. [Entry Date: 10/1/99] (pmay) [Entry date 10/01/99]
12/30/99	3	ORDER by Judge Joseph H. McKinley Jr. vacating [2-1] social security order (cc: all counsel) [Entry Date: 12/30/99] (phay)
2/8/00	8	STIPULATION of dismissal with respect to Counts I, II, and III of plas' complaint as settled (phay)
2/8/00	8	ORDER by Judge Joseph H. McKinley Jr. granting stipuation of dismissal with respect to Counts I, II, and III of plas' complaint [8-1] (cc: all counsel) [Entry Date: 2/8/00] (phay) [Edit date 02/08/00]

DATE	DOCKET NUMBER	PROCEEDINGS
2/11/00	10	MOTION by plaintiff Eastern Associated, plaintiff Peabody Coal Company for partial summary judgment; Memorandum in Support; order tendered (phay) [Entry date 02/14/00]
2/29/00	12	RESPONSE (OBJECTION) by Defendant to motion for partial summary judgment (10-1); order tendered (phay) [Entry date 03/02/00] [Edit date 03/14/00]
3/1/00	13	ANSWER by defendant CSS to Counts IV-VI of plas' complaint [1-1] (phay) [Entry date 03/02/00]
3/14/00	15	ORDER by Judge Joseph H. McKinley Jr. granting motion for partial summary judgment [10-1] and declared that all initial assignments the Commissioner made to Peabody Coal and Eastern Associated after 9/30/93 are null and void; Commissioner is enjoined from making any initial assignments to Peabody Coal and Eastern Associated in the

DATE	DOCKET NUMBER	PROCEEDINGS
		future; and ordered that Commissioner shall notify UMWA Combined Benefit Fund within 45 days of entry of this order of the identity of each beneficiary assignment to Peabody Coal and Eastern Associated from the Social Security Administration subject to this order, and inform the Combined Fund that said assignments are void and have been withdrawn terminating case (cc: all counsel) [Entry Date: 3/14/00] (eski)
3/21/00	16	MOTION by plaintiff Eastern Associated, plaintiff Peabody Coal Company to voluntarily dismiss Count VI of their Complaint; Memorandum in Support; order tendered (phay)
4/10/00	17	RESPONSE (OBJECTION) by defendant CSS to motion to voluntarily dismiss Count VI of their Complaint [16-1]; order tendered (phay) [Entry date 04/13/00]

DATE	DOCKET NUMBER	PROCEEDINGS
4/13/00	18	ORDER by Judge Joseph H. McKinley Jr. granting motion to voluntarily dismiss Count VI of their Complaint WITH PREJUDICE [16-1] (cc: all counsel) [Entry Date: 4/13/00] (seal)
5/31/00	19	MOTION by defendant CSS for entry of judgment; Memorandum in Support; order tendered (phay)
6/19/00	20	RESPONSE (OBJECTION) by plaintiff Eastern Associated, plaintiff Peabody Coal Company to motion for entry of judgment [19-1]; order tendered (phay)
6/30/00	21	REPLY by defendant CSS to response to motion for entry of judgment [19-1] (phay) [Entry date 07/03/00]

DATE	DOCKET NUMBER	PROCEEDINGS
7/11/00	22	FINAL JUDGMENT by Judge Joseph H. McKinley Jr. granting dft's motion for entry of judgment [19-1] dismissing case (cc: all counsel) [Entry Date: 7/11/00] (phay)
9/8/00	23	NOTICE OF APPEAL by defendant CSS to USCA re final judgment [22-2] (cc: all counsel) (phay) [Entry date 09/11/00]

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

DOCKET No. 00-6239

PEABODY COAL COMPANY; EASTERN ASSOCIATED COAL CORPORATION, PLAINTIFFS-APPELLEES

v.

COMMISSIONER OF SOCIAL SECURITY, KENNETH S. APFEL, DEFENDANT-APPELLANT

RELEVANT DOCKET ENTRIES

DATE	PROCEEDINGS
9/18/00	Civil Case Docketed. Notice filed by Appellant Comm Social Security. Transcript needed: n ❑ (jmb)
10/6/00	TENDERED: petition for hearing en banc from Jeffrey Clair for Appellant Comm Social Security [00-6239] (blh)
10/24/00	PETITION for en banc hearing filed by Jeffrey Clair for Appellant Comm Social Security. Certificate of service date 10/5/00. [00-6239] (blh)
12/6/00	ORDER filed denying petition for en banc hearing [2243347-1] filed by Jeffrey Clair [00-6239]. Entered by order of the court. (blh)

DATE	PROCEEDINGS
1/30/01	PROOF BRIEF filed by Jeffrey Clair for Appellant Comm Social Security. Certificate of service date 1/29/01 Number of Pages: 35. [00-6239] ❑ (lak)
2/16/01	PROOF BRIEF filed by John R. Woodrum for Appellee Eastern Assoc Coal, Appellee Peabody Coal Co, Gross C. Lindsayfor Appellee Eastern Assoc Coal, Appellee Peabody Coal Co. Certificate of service date 2/12/01. Number of Pages: 32. [00-6239] ❑ (lak)
3/2/01	FINAL BRIEF filed by Jeffrey Clair for Appellant Comm Social Security. Copies: 7. Certificate of service date 3/1/01 Number of Pages: 35. [00-6239] (lak)
3/2/01	TENDERED: final reply brief from Jeffrey Clair for Appellant Comm Social Security [00-6239] (lak)
3/2/01	FINAL REPLY BRIEF filed by Jeffrey Clair for Appellant Comm Social Security. Copies: 7 Certificate of service date 3/1/01 Number of Pages: 21. [00-6239] (lak)
3/6/01	FINAL BRIEF filed by John R. Woodrum, Gross C. Lindsay for Appellee Eastern Assoc Coal, Appellee Peabody Coal Co. Copies: 7. Certificate of service date 3/5/01. Number of Pages: 32. [00-6239] (lak)

DATE	PROCEEDINGS
4/12/01	CAUSE SUBMITTED on briefs to panel consisting of Judges Martin, Norris, Quist sitting on 6/13/01. [00-6239] (srw)
6/21/01	Per Curiam OPINION filed: AFFIRMED, decision not for publication pursuant to local rule 28(g) [00-6239]. Boyce F. Martin, Chief Judge, Alan E. Norris, Circuit Judge, Gordon J. Quist, District Judge. (jmb)
8/16/01	MANDATE ISSUED with no cost taxed [00-6239] (lak)
10/15/01	U.S. Supreme Court letter filed: extension ot [*sic*] time within which to file a petition for a writ of certiorari granted to and including 11-18-01 [2438864-1]. [00-6239] (swh)
11/27/01	U.S. Supreme Court notice filed regarding petition for writ of certiorari filed by Appellant Comm Social Security. Filed in the Supreme Court on 11-19-01, Supreme Ct. case number: 01-705. [00-6239] (swh)
1/30/02	U.S. Supreme Court letter filed granting petition for writ of certiorari [2462048-1] filed by Comm Social Security [00-6239]. Filed in the Supreme Court on 01-22-02. (swh)

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF KENTUCKY
OWENSBORO DIVISION

CIVIL ACTION No. 4:99CV-201(M)

PEABODY COAL COMPANY AND EASTERN ASSOCIATED COAL CORP., PLAINITIFFS

v.

KENNETH S. APFEL, COMMISSIONER, SOCIAL SECURITY ADMINISTRATION, DEFENDANT

[Filed: Sept. 30, 1999]

COMPLAINT

Plaintiffs, Peabody Coal Company and Eastern Associated Coal Corp., seek an order vacating the assignment to Plaintiffs of certain UMWA Combined Benefit Fund ("Combined Fund") beneficiaries by Defendant, Kenneth S. Apfel, the Commissioner of Social Security ("Commissioner") and certain injunctive relief.

THE PARTIES

1. Plaintiff, Peabody Coal Company ("Peabody Coal"), a corporation duly organized and existing under the laws of the State of Delaware, maintains its principal place of business at 701 Market Street, St. Louis, MO 63101. Peabody Coal is a wholly-owned subsidiary of Peabody Holding Company, Inc.

2. Plaintiff, Eastern Associated Coal Corp. ("EACC") is a West Virginia corporation with its principal place of business at 800 Laidley Tower, Charleston, WV 25324. EACC is a wholly-owned subsidiary of Peabody Holding Company, Inc. Pursuant to section 9704(a) of the Coal Act, Peabody Coal and EACC are jointly and severally liable for the others' Combined Fund beneficiaries.

3. Defendant, Kenneth S. Apfel, maintains his principal office at 6401 Security Boulevard, Baltimore, MD 21235 where, as Commissioner, he presides over the Social Security Administration ("SSA"), a federal agency that administers and enforces various programs and performs functions throughout the United States. The Commissioner is responsible under the Coal Industry Retiree Health Benefit Act of 1992, 26 U.S.C. §§ 9701-9722, ("Coal Act" or "Act") for assigning Combined Fund beneficiaries to signatory operators (and their related persons) in accordance with section 9706 of the Act and for calculating health benefit premiums covering assigned beneficiaries. The Commissioner has delegated his responsibilities for making beneficiary assignments to administrators at SSA's regional service centers.

JURISDICTION AND VENUE

4. Subject matter jurisdiction is proper pursuant to 28 U.S.C. §§ 1331, 2201; 26 U.S.C. §§ 9706(f), 9721; and 5 U.S.C. §§ 701-706.

5. Venue is proper pursuant to 28 U.S.C. § 1391(e). Peabody Coal maintains an office at 1951 Barrett Court, Henderson, Kentucky 42420-1990 within this judicial district which through 1995 served as its corporate headquarters, has conducted and continues to conduct

mining operations in this district, and substantial activities relating to SSA's assignment of beneficiaries to Peabody Coal occurred in this district.

THE COAL ACT

6. The Coal Act required the Commissioner to assign certain coal industry retirees to signatory operators, or, where the signatory operator was no longer in business to the signatory operator's related person. 26 U.S.C. § 9706(a). Each such signatory operator is required to pay annual per-beneficiary health and death premiums to the Combined Fund for each beneficiary assigned to it by SSA. 26 U.S.C. § 9704(a).

7. A signatory operator is statutorily defined to include a person which is or was a signatory to a National Bituminous Coal Wage Agreement ("NBCWA"). 26 U.S.C. § 9701(c)(1).

8. A related person refers to, among other things, a person who is a member of a controlled group of corporations that includes a signatory operator, a trade or business under common control with such signatory operator, a partner (other than a limited partner) or joint venturer with such signatory operator, or is a successor in interest to a related person of such signatory operator. 26 U.S.C. § 9701(c)(2)(A).

9. The date for determining related person status is the date immediately proceeding the date the signatory operator ceased to be in business, or July 20, 1992, whichever occurred first. 26 U.S.C. § 9701(c)(2)(B).

10. Each Plaintiff herein is a signatory operator within the meaning of the Coal Act.

11. A signatory operator is considered in business if it conducts or derives revenue from any business activity. 26 U.S.C. § 9701(c)(7).

12. The Commissioner was required to prioritize eligible beneficiaries when making Coal Act assignments. The Commissioner was to assign an eligible coal industry retiree first to a signatory operator (or its active related person) that signed the 1978 NBCWA and was the most recent signatory operator to employ the coal industry retiree in the coal industry for at least two years ("Priority One"). 26 U.S.C. § 9706(a)(1).

13. If an assignment was not possible under Priority One, the Commissioner was to assign the retiree to an operator (or its active related person) that signed the 1978 NBCWA and was the most recent signatory operator to employ the retiree in the coal industry ("Priority Two"). 26 U.S.C. § 9706(a)(2).

14. If the beneficiary could not be assigned under Priority One or Priority Two, the Commissioner was required to assign the retiree to the pre-1978 signatory operator (or its active related person) that employed the retiree in the coal industry for the longest period of time prior to the effective date of the 1978 NBCWA ("Priority Three"). 26 U.S.C. § 9706(a)(3).

EASTERN ENTERPRISES V. APFEL

15. In *Eastern Enterprises v. Apfel*, 118 S. Ct. 2131 (1998), the Supreme Court held that Priority Three assignments were unconstitutional as violative of the Fifth Amendment of the U.S. Constitution as applied to Eastern Enterprises ("Eastern"). A four Justice plurality held that the Act violated the Takings Clause, *id.* at 2144-53, while a fifth Justice, Justice Kennedy, concurred in the judgment of the Court and wrote a

separate opinion (dissenting in part), which found that the Coal Act violated the Due Process Clause.

16. The plurality and Justice Kennedy both based their holdings on the fact Eastern ceased its coal mining operations in 1965–years before the first promise of lifetime benefits to miners was made in the 1974 NBCWA and subsequent NCBWAs. *Id.* at 2150, 2159.

17. After the Supreme Court issued its judgment in *Eastern* in June 1998, the Commissioner voided the assignments of beneficiaries under the Coal Act to numerous former coal operators which had previously been assigned beneficiaries under Priority Three and were similarly situated to Eastern.

COUNT I
(Peabody Coal)
Request for Declaratory Judgment that Peabody Coal is not a Related Person to Tecumseh

18. Peabody Coal restates and herein incorporates by reference Paragraphs 1 through 17 of the Complaint.

19. By various letters in 1993 and 1995, the Commissioner assigned beneficiaries to Peabody Coal who had actually worked for Tecumseh Coal Company ("Tecumseh"), the latter a signatory operator through 1965 that still remains in business within the meaning of section 9701(c)(7) of the Act.

20. The Commissioner assigned the Tecumseh retirees (and their eligible dependents) (collectively the "Tecumseh Beneficiaries") to Peabody Coal because SSA erroneously determined Peabody Coal is a related person to Tecumseh within the meaning of section 9701(c)(2) of the Coal Act. (The Tecumseh Beneficiaries are listed on Attachment A).

21. As of July 20, 1992, Peabody Coal owned only 50% of Tecumseh's outstanding shares, and therefore, (i) was not in a controlled group of corporations with Tecumseh; (ii) was not a trade or business under common control with Tecumseh; (iii) was not a partner of nor a joint venturer with Tecumseh; and, (iv) was not a successor in interest to an entity that was a related person to Tecumseh.

22. Peabody Coal is not a related person to Tecumseh as that term is defined in the Coal Act.

23. On February 3, 1999, Peabody Coal requested the Commissioner to withdraw his assignment of the Tecumseh Beneficiaries to Peabody Coal because Peabody Coal is not a related person to Tecumseh, and because the assignments violate the Fifth Amendment as set forth in *Eastern*. The Commissioner has failed or refused to withdraw the assignment of the Tecumseh Beneficiaries to Peabody Coal.

24. SSA's assignments of the Tecumseh Beneficiaries to Peabody Coal are void and must be vacated and reversed because Peabody Coal is not a related person to Tecumseh and such assignments exceed SSA's authority under the Coal Act and are erroneous as a matter of law.

COUNT II
(Peabody Coal)
Request for a Declaratory Judgment that the Assignment of the Tecumseh Beneficiaries to Peabody Coal Violates the Fifth Amendment

25. Peabody Coal restates and herein incorporates by reference Paragraphs 1 through 24 of the Complaint.

26. With respect to the Tecumseh Beneficiaries, the Supreme Court's decision in *Eastern* compels the conclusion that the Coal Act is unconstitutional as applied to Peabody Coal. Constitutionally, Tecumseh's factual situation is indistinguishable from that which the Supreme Court considered in *Eastern*. Like Eastern, Tecumseh ceased employing UMWA-represented miners in 1965. Like the beneficiaries assigned to Eastern, the Tecumseh Beneficiaries were assigned under Priority Three.

27. Inasmuch as the Commissioner's assignment of the Tecumseh Beneficiaries to Peabody Coal is indistinguishable from the Commissioner's assignments to Eastern, such assignments violate Peabody Coal's rights in violation of the Fifth Amendment.

COUNT III
(Peabody Coal)
Request for Declaratory Judgment that the Commissioner's Refusal to Withdraw the Tecumseh Beneficiaries Violates the Administrative Procedure Act

28. Peabody Coal restates and herein incorporates by reference Paragraphs 1 through 27 of the Complaint.

29. By letter dated February 3, 1999, Peabody Coal requested the Commissioner to void the assignment of the Tecumseh Beneficiaries as required by the Supreme Court's decision in *Eastern*.

30. The Commissioner has failed and refused to respond to Peabody Coal's request and has failed and refused to withdraw the assignment to Peabody Coal of the Tecumseh Beneficiaries.

31. Pursuant to the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 701 *et seq.*, the Commissioner's decision to adopt the Court's rationale in *Eastern* and to apply it to similarly situated assigned operators, but not to Peabody Coal, is arbitrary and capricious, an abuse of discretion, and not in accordance with law.

COUNT IV
(Peabody Coal and EACC)
Request for Declaratory Judgment Invalidating Beneficiary Assignments Made to Peabody Coal and EACC after September 30, 1993

32. Plaintiffs restate and herein incorporate by reference Paragraphs 1 through 31.

33. Section 9706(a) of the Coal Act required the Commissioner to assign Combined Fund beneficiaries to a signatory operator (or its active related person) before October 1, 1993.

34. Where the Commissioner could not assign a beneficiary to a signatory operator (or its active related person) by October 1, 1993, such beneficiary was to be placed in the unassigned beneficiary pool ("Unassigned Pool").

35. Premiums for beneficiaries in the Unassigned Pool are paid from transfer payments made to the Combined Fund from the 1950 UMWA Pension Plan (26 U.S.C. § 9705(a)), or from the Abandoned Mine Land Reclamation Fund managed by the Secretary of the Department of Interior (26 U.S.C. § 9705(b), 30 U.S.C. § 1242(h)). Should such transfers prove inadequate, the cost of providing benefits to beneficiaries in the Unassigned Pool is to be shared pro rata by all assigned operators (26 U.S.C. § 9704(d)).

36. The Commissioner, in violation of his authority under section 9706(a), assigned Coal Act beneficiaries to Peabody Coal and EACC from the Unassigned Pool after September 30, 1993.

37. The Commissioner's assignment to Plaintiffs of beneficiaries from the Unassigned Pool after September 30, 1993 violates the Sixth Circuit Court of Appeals' decision in the case of *Dixie Fuel Co. v. Apfel*, 171 F.3d 1052 (6th Cir. 1999), which held that the Commissioner is without authority to assign beneficiaries from the Unassigned Pool after September 30, 1993.

38. Plaintiffs, for purposes of the instant action, are similarly situated to Dixie Fuel.

39. The Commissioner has failed or refused to apply the Court's ruling in *Dixie Fuel* to Plaintiffs.

40. The Commissioner's decision to not withdraw beneficiaries assigned to Plaintiffs from the Unassigned Pool after September 30, 1993 violates section 9706(a) of the Coal Act, and also sections 702 and 706(2)(C) of the APA because it is not in accordance with law, and constitutes an abuse of discretion.

COUNT V

(Peabody Coal and EACC)
Request for Injunctive Relief Barring Future Assignments from the Unassigned Pool

41. Plaintiffs restate and herein incorporate by reference the allegations of Paragraphs 1 through 40 of the Complaint.

42. The Commissioner's assignment to Peabody Coal and EACC of beneficiaries from the Unassigned Pool after September 30, 1993 exceeds the scope of his

statutory authority and violates the Sixth Circuits Court of Appeals' decision in *Dixie Fuel Co. v. Apfel.*

43. Notwithstanding his existing violations of the statutory mandate barring assignments from the Unassigned Pool, upon information and belief, the Commissioner intends in the near future to continue making Coal Act assignments to Plaintiffs.

44. Continued assignments from the Unassigned Pool violate the APA, the Coal Act and binding Sixth Circuit precedent and sanction the use of injunctive powers to permanently bar the Commissioner from making such assignments to Peabody Coal and EACC in the future.

COUNT VI

(Peabody Coal and EACC)
Declaration Invalidating the Coal Act Assignments of George Weaver, Bude Jarvis, William Barnett, Jewell Peterson, Jack Callor, Jarrett Shrewsbury, Michael Restic and Lovell Kelley

45. Plaintiffs restate and herein incorporate by reference the allegations of Paragraphs 1 through 44 of the Complaint.

46. The Coal Act's assignment hierarchy requires the Commissioner to first assign UMWA retirees to a coal operator (or its related person) that signed the 1978 NBCWA and was the most recent signatory operator to employ the coal industry retiree in the coal industry for at least two years (Priority One). 26 U.S.C. § 9706(a)(1). Only where the Commissioner is unable to identify such an operator may an assignment be made under Priority Two to a signatory to the 1978

NBCWA that employed the miner for less than two years. 26 U.S.C. § 9706(a)(2).

47. The Commissioner assigned George Weaver and Bude Jarvis to EACC and William Barnett to Peabody Coal under Priority Two. Plaintiffs filed timely reconsideration requests providing documentary evidence establishing these miners were properly assignable under Priority One to unrelated signatory operators (or their active related persons) that signed the 1978 NBCWA and were the most recent signatory operators to have employed them for at least two years.

48. This notwithstanding, by final decision letters respectively dated June 17, 1996, April 14, 1997, and April 2, 1997 the Commissioner refused to withdraw the assignments of Messrs. Weaver, Jarvis and Barnett.

49. The Commissioner assigned Jarrett Shrewsbury to EACC and Jewell Peterson and Jack Callor to Peabody Coal under Priority One. EACC and Peabody Coal filed timely reconsideration requests establishing that they were properly assigned under Priority One to an unrelated signatory operator that subsequently employed them for more than two years.

50. This notwithstanding, by final decision letters respectively dated June 17, 1996, July 11, 1995 and May 29, 1995 the Commissioner refused to withdraw the assignment of Messrs. Shrewsbury, Peterson and Callor.

51. Messrs. Weaver, Jarvis, Barnette [*sic*], Shrewsbury, Peterson and Callor would not have been assigned to Plaintiffs if the Commissioner had followed the assignment priority scheme mandated by the Coal Act, and their assignment to Peabody Coal and EACC therefore violates section 9706 of the Coal Act.

52. In applying the Coal Act assignment hierarchy the Commissioner was not permitted to take into account time worked in supervisory jobs or other tasks not covered under applicable NBCWAs.

53. The Commissioner assigned Michael Restic and Virgil Kelley to EACC which timely filed reconsideration requests along with documentary evidence establishing Mr. Restic never performed classified work for EACC and Mr. Kelley retired from the coal industry a year before he received the $18 payment prompting the Commissioner's assignment.

54. This notwithstanding, by final decision letter dated June 17, 1996, the Commissioner refused to withdraw the assignments of Messrs. Restic and Kelley.

55. The Commissioner's final determinations affirming the assignments to Peabody and EACC of the coal industry retirees referenced in Paragraphs 47-54 above violate the Coal Act and the APA; they fail to follow the assignment scheme mandated by the Coal Act, impermissibly shift the burden of persuasion, are arbitrary, capricious, an abuse of discretion, not in accordance with law, unwarranted by the facts, unsupported by the evidence, plainly erroneous and contain errors apparent from the face of the Commissioner's own records and/or from other information he was required to consider.

56. The Commissioner's final determinations have caused Peabody Coal and EACC to incur Combined Fund premium obligations and other expenses and harm that they would not have incurred had the Commissioner properly performed his duties under the Coal Act.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs demand judgment against Defendant and pray for the following relief:

1. An Order that declares that Peabody Coal (or any other entity or person related to, or affiliated with Peabody Coal) is not a related person to Tecumseh within the meaning of section 9701(c)(2), and that the assignment of the Tecumseh Beneficiaries listed on Attachment A violates the Coal Act.

2. An Order that declares that the Coal Act, as applied to the assignment of the Tecumseh Beneficiaries to Peabody Coal, violates the Fifth Amendment of the U.S. Constitution.

3. An Order that directs the Commissioner to withdraw the assignment of all Tecumseh Beneficiaries to Peabody Coal and that directs the Commissioner to inform the Combined Fund that such assignments have been withdrawn.

4. An Order declaring the Commissioner's assignments to Peabody Coal and EACC from the Unassigned Pool after September 30, 1993 are void and in violation of section 9706(a) of the Coal Act.

5. An Order enjoining the Commissioner from making any future Coal Act assignments from the Unassigned Pool to Peabody Coal and EACC (or any other entity or person related to, or affiliated with either Plaintiff.)

6. An Order declaring that the Commissioner's decision not to withdraw assignments made to Peabody Coal and EACC from the Unassigned Pool after September 30, 1993 violates section 702 of the APA.

7. An Order declaring that the Commissioner's policy of making assignments from the Unassigned Pool to Peabody Coal and EACC after September 30, 1993 is in excess of his statutory jurisdiction and properly set aside pursuant to section 706(2)(C) of the APA.

8. An Order that requires the Commissioner to inform the Combined Fund that the assignments to Peabody Coal and EACC from the Unassigned Pool have been withdrawn.

9. An Order that declares that the Commissioner's assignment of Messrs. Barnett, Peterson and Callor to Peabody Coal and Messrs. Weaver, Jarvis, Shrewsbury, Restic, and Kelley to EACC violates section 9706(a) of the Coal Act and the APA.

10. Such additional relief as this Court deems equitable and just.

Respectfully submitted,

ILLEGIBLE SIGNATURE
Gross Lindsay
Trimble, Lindsay & Shea
P.O. Box 19
Henderson, KY 42419-0019
(270) 827-9824

John R. Woodrum
W. Gregory Mott
Heenan, Althen & Roles
1110 Vermont Avenue, N.W.
Suite 400
Washington, D.C. 20005

Dated: September 30, 1999

Attachment A

Tecumseh Beneficiaries

Matthews, Hobeart
Matthews, Mildred

Wilson, Frank H.
Wilson, Etta

Osborne, James P.
Osborne, Myrtle

Eifler, Theodore R.
Eifler, Mabel

Boyer, Charles R.
Boyer, Margaret

Baker, Gilbert M.
Baker, Lorean

Scheucher, Thomas E.
Scheucher, Hattie

Garrison, Harold L.
Garrison, Leona

Hart, Walter
Hart, Evelyn H.

Gentry, Lloyd B.

Madden, Charles B.
Madden, Jewel M.

Gentry, Burless
Gentry, Geneva

Clinton, Chumbley T.

Brown, Willie L.
Brown, Ruth E.

Speicher, Raymond
Speicher, Sarah F.

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF KENTUCKY
OWENSBORO DIVISION

CIVIL ACTION No. 4:99CV-201-M

PEABODY COAL COMPANY, ET AL., PLAINTIFFS

v.

KENNETH S. APFEL, COMMISSIONER, SOCIAL SECURITY ADMINISTRATION, DEFENDANT

AFFIDAVIT OF DANNY R. MORIARTY

I, Danny R. Moriarty, after being duly sworn, state:

1. I am the Director—Cost Containment for the Peabody Group. My office address is Peabody Holding Co., Inc., 701 Market Street, Suite 700, St. Louis, MO 63101-1826.

2. As the Director—Cost Containment, my responsibilites include overseeing the processing of assignments made by the Commissioner of Social Security ("Commissioner") to Peabody Coal Company ("Peabody") and Eastern Associated Coal Corp. ("EACC"), under the Coal Industry Retiree Health Benefit Act of 1992 (the "Coal Act"), 26 U.S.C. §§ 9701-9722.

3. Following the Sixth Circuit Court of Appeal's ruling in *Dixie Fuel Co. v. Apfel*, 171 F.3d 1052 (6th Cir. 1999), I mailed letters dated May 25, 1999, to the Social Security Administration ("SSA") to establish whether the Commissioner had made initial Coal Act assignments to Peabody and EACC after September 30, 1993

from SSA'S unassigned pool in a manner materially indistinguishable from the assignments invalidated by the Court in *Dixie Fuel*. SSA's response to my letters are set forth below.

4. I received a letter dated June 15, 1999 from Darrell Blevins, SSA's Freedom of Information Officer, confirming that SSA's Northeastern regional service center had made sixty-seven (67) assignments to Peabody from the unassigned pool. (A true and correct copy of such letter is attached hereto as Exhibit 1.)

5. I received a letter dated June 17, 1999 from Mr. Blevins confirming that SSA's Northeastern regional service center had made four (4) assignments to EACC from SSA's unassigned pool. (A true and correct copy of such letter is attached as Exhibit 2).

6. I received a separate letter dated June 17, 1999 from Mr. Blevins confirming that SSA's Southeastern regional service center had made one hundred ninety seven (197) assignments to Peabody Coal Company from SSA's unassigned pool. (A true and correct copy of said letter is attached as Exhibit 3.)

7. I received a letter dated June 17, 1999 from Mr. Blevins, confirming, that SSA's Southeastern regional service center had made seven (7) assignments to EACC from SSA's unassigned pool. (A true and correct copy of said letter is attached hereto as Exhibit 4.)

8. More recently, I received a separate letter dated January 3, 2000 from Mr. Blevins, confirming that SSA's Great Lakes regional service center had made fifty-five (55) assignments to Peabody from SSA's unassigned pool. (A true and correct copy of said letter is attached as Exhibit 5.)

9. Upon information and belief there may be additional assignments to Peabody and EACC from SSA's unassigned pool.

10. The documentation and information provided in the Exhibit are true and accurate to my best information, knowledge and belief.

Further this affiant saith not.

/s/ DANNY R. MORIARTY
DANNY R. MORIARTY

My Commission Expires: 12-22-02

[Seal Omitted]

SOCIAL SECURITY

Refer to: TASC-NY 5451

June 17, 1999

Mr. Danny R. Moriarty
Peabody Group
701 Market Street, Suite 700
St. Louis, MO 63101-1826

RE: Peabody Coal Company

Dear Mr. Moriarty:

I am writing in response to your letter of May 25, 1999 to the Southeastern Program Service Center (PSC) requesting information under the Coal Industry Retiree Heath Benefit Act of 1992 (the Coal Act). Your letter was transferred to me because of my responsibilities under the Freedom of Information Act.

You enclosed with your letter listings of retired miners who were assigned to Peabody Coal Company by Southeastern PSC and Western PSC after October, 1993, and you asked for the name of the company to which the miners were previously assigned. I have enclosed 10 pages containing this information, as well as two pages containing the names of those miners included in the lists you sent who are no longer assigned to Peabody Coal Company.

You also asked for the same information about three miners assigned by Western PSC, Donald J. Dugger, Gabriele Fiaoni, and William A. Simmons. All of these miners were assigned to Peabody Coal Company in the initial round of assignments. The fourth miner on this

list, Charlie Roberts, was assigned by Northeastern PSC in the initial round of assignments. None of these miners has ever been assigned to another company.

Sincerely,

/s/ DARRELL BLEVINS
DARRELL BLEVINS
Freedom of Information Officer

Enclosure

EIN: 13-2606920 Page 1 of 12

SEPSC/WNPSC Miners No Longer Assigned to Peabody Coal Company

Miner

Thomas, Billy T.
Lewis, Harding
Polk, James C.
Myers, Thomas S.
Ausbine, Roy R.
McNeely, Arnold E.
Martin, Floyd
Hawk, Bill
Jordan, Oliver J.
Perry, Willie C.
Smith, J.
Cotton, Arvil
Martin, James P.
Wright, Lucas L.
Cross, Arvel
Wilson, Carlie
Strunk, Delmus E.
McKinney, Eugene G.
Owens, Willie B.
Roberts, Ed
Pennington, James
Johnson, Edgar H.
Daugherty, Fred F.
Marcum, Fred B.
Hatmaker, Floyd O.
Huffman, Erby, F.
Boggess, Pete M.
Gilbert, Clarence A.

Lowe, Lon L.
Collingsworth, Bayless L.
Hatmaker, Marion
Nighbert, Lloyd E.
Thompson, Millard G.
Beach, Charles F.
Ellis, Milford E.
Phillips, Richard E.
Wright, Claude R.
Hatmaker, Leon
Sexton, Eamer
Smith, Lindsay K.
Hatmaker, Fred
Childress, Dewey
Adkins, Floyd
Wright, Ed
Cross, Marion T.
Pressnel, Roy
McLin, George D.

EIN: 13-2606920 Page 2 of 12

Previously Assigned Coal Operators for Miners Assigned to Peabody Coal Co. by SEPSC Letter Dated 06/30/95

MINER	PREVIOUSLY ASSIGNED OPERATOR
Phillips, J.	Island Creek Coal Co.
Denson, Marion P.	Floyd Mining Co., Inc.
Ford, Edward D.	Island Creek Coal Co.
Steele, Roy B.	Mid-Continent Coal & Coke Co.
Hooker, Sidney	Harlan Wallins Coal Corp.

EIN: 13-2606920 Page 3 of 12

Previously Assigned Coal Operators for Miners Assigned to Peabody Coal Co. by WNPSC Letter Dated 06/30/95

MINER	PREVIOUSLY ASSIGNED OPERATOR
Edwards, James O.	Floyd Mining Co., Inc.
Wheeler, John J.	General Motors Corp.
Engle, Arthur	Templeton Coal Co.
Slover, John F.	Templeton Coal Co.
Pigford, Matthew	Mid-Continent Coal & Coke Co.
Lawson, Malcolm	Yocum Creek Coal Co.
Dotson, Thelmer J.	Harlan Wallins Coal Corp.

EIN: 13-2606920 Page 4 of 12

Previously Assigned Coal Operators for Miners Assigned to Peabody Coal Co. by SEPSC Letter Dated 09/20/95

MINER	PREVIOUSLY ASSIGNED OPERATOR
Brooks, Clyde M.	Not previously assigned
Nickell, Crowder N.	Not previously assigned

EIN: 13-2606920 Page 5 of 12

Previously Assigned Coal Operators for Miners Assigned to Peabody Coal Co. by WNPSC Letter Dated 09/20/95

MINER	PREVIOUSLY ASSIGNED OPERATOR
Raney, Stanley	Inland Steel Co.
Barnett, William	Westmoreland Coal Co.
Teague, Craig G.	Four Leaf Coal Co.

EIN: 13-2606920 Page 6 of 12

Previously Assigned Coal Operators for Miners Assigned to Peabody Coal Co. by SEPSC Letter Dated 09/16/96

MINER	PREVIOUSLY ASSIGNED OPERATOR
Timko, Henry M.	Not previously assigned
Ippolito, John A.	Not previously assigned
Broutin, Alfred	Not previously assigned
Urbon, Carl	Not previously assigned
Barwick, John M.	Consolidation Coal Co.
Webb, Lloyd T.	Not previously assigned
Metz, Elmer	Not previously assigned
Berta, Charles	Not previously assigned
Germann, Lewis J.	Not previously assigned
Zara, James	Not previously assigned
Dove, Sethie L.	Not previously assigned
McEnary, John E.	Not previously assigned
Middleton, Woodrow	Not previously assigned
Franklin, Otis	Drummond Coal Sales, Inc.
Ryder, John D.	Not previously assigned
Farris, Thomas R.	Not previously assigned
Miles, Robert P.	Not previously assigned
Olson, Lavern A.	Not previously assigned
Ainscough, Otis	Not previously assigned
Brown, Harold P.	Not previously assigned
Leek, Carl H.	Consolidation Coal Co.
Vineyard, Hoyt H.	Not previously assigned
Overbay, Claude	Not previously assigned
Brown, Roscoe W.	Not previously assigned
Vaughn, Zeather D.	Not previously assigned

Sturdivant, Joseph	Not previously assigned
Bailey, Claude A.	Not previously assigned
King, Carl B.	Not previously assigned
Wood, John F.	Not previously assigned
Anthony, Foley D.	Not previously assigned
Haga, James F.	Not previously assigned
Anthony, Avery F.	Not previously assigned
Reed, Haven	Not previously assigned
McBride, Clownie A.	Not previously assigned
Harp, Richard	Eastern Enterprises
Clover, E. A.	Not previously assigned
Gentry, Russell	Not previously assigned
Norton, James L.	Not previously assigned
Griffin, Earl G.	Not previously assigned
Euriga, Mike	Not previously assigned
Archer, Cecil S.	Consolidation Coal Co.
Peck, Arthur	Not previously assigned
Davis, Robert L.	Not previously assigned
Smith, George	Not previously assigned

EIN: 13-2606920 Page 7 of 12

Previously Assigned Coal Operators for Miners Assigned to Peabody Coal Co. by SEPSC Letter Dated 09/16/96 (cont.)

MINER	PREVIOUSLY ASSIGNED OPERATOR
Parks, Homer D.	Not previously assigned
Lievens, Peter F.	Not previously assigned
Preston, Clarence J.	Not previously assigned
Gilbert, Buford	Not previously assigned
Miracle, V.	Not previously assigned
Wagner, Dan	Not previously assigned
Ellis, Norman	Not previously assigned
Elliott, John	Not previously assigned
Lane, Henlin	Not previously assigned
Stewart, Wiley P.	Harlan Wallins Coal Corp.
Mink, George	Not previously assigned
Carter, Clevis	Not previously assigned
Vanover, Homer	Not previously assigned
Brock, Farmer	Not previously assigned
Jones, John H.	Not previously assigned
Saylor, Otis	Not previously assigned
Lawson, Lawrence J.	Not previously assigned
Collett, Blevins	Not previously assigned
Elliott, Simon	Not previously assigned
Silcox, Paul	Not previously assigned
Nix, Thurman	Not previously assigned
Davis, Chalmer	Not previously assigned
Cickie, Frank	Not previously assigned
Bays, R.	Not previously assigned
Collins, James O.	Not previously assigned

Stamper, Everett	Rocket Coal Co., Inc.
Knuckles, Albert	Not previously assigned
Peace, Tom	Not previously assigned
Douglas, Floyd W.	Not previously assigned
Marlow, Duff	Not previously assigned
Douglas, Spencer	Not previously assigned
Chadwell, James L.	Not previously assigned
Petrey, Clefton E.	Not previously assigned
Queener, Francis C.	Not previously assigned
Austin, John M.	Not previously assigned
Davis, George F.	Not previously assigned
Gordon , Robert	Not previously assigned
Bob Ruthaford	Not previously assigned
Gibson, Claude	Not previously assigned
Davis, Theodore L.	Not previously assigned
Queener, Arthur C.	Not previously assigned
Rutherford, Noah S.	Not previously assigned
Leach, William E.	Not previously assigned
Cuel, Frank A.	Not previously assigned

Previously Assigned Coal Operators for Miners Assigned to Peabody Coal Co. by SEPSC Letter Dated 09/16/96 (cont.)

MINER	PREVIOUSLY ASSIGNED OPERATOR
Albertini, Pete	Not previously assigned
Ridenour, Millard	Not previously assigned
Thomas, Clyde	Not previously assigned
King, Everett	Not previously assigned
Douglas, Charles F.	Not previously assigned
Weaver, Hersul	Not previously assigned
Morris, James B.	Not previously assigned

Previously Assigned Coal Operators for Miners Assigned to Peabody Coal Co. by WNPSC Letter Dated 09/16/96

MINER	SSN	PREVIOUSLY ASSIGNED OPERATOR
Bragg, Viven D.		Not previously assigned
Lorenzini, John		Not previously assigned
Beadle, Ernest E.		Not previously assigned
Walter, Clarence		Not previously assigned
Atmore, Henry L.		Not previously assigned
Simpson, Walter		Not previously assigned
Smiley, Carl		Not previously assigned
Palulis, Stanley		Not previously assigned
Sincavage, Joe		Not previously assigned
Matulevich, Bernard		Not previously assigned
Segers, Laurel W.		Not previously assigned
Jeter, Kenneson J.		Not previously assigned
Puckett, Carl		Not previously assigned
Mann, Elmer J.		Not previously assigned
Lampley, Earl		Not previously assigned
Furlow, N. L.		Peabody Coal Co.*

(*Miner was assigned to Peabody under incomplete EIN 13-260920; computer letter dated 9/28/93 was incomplete and undeliverable. WNPSC added Round 1 miner to Round 4 notice.)

Willhouse, Ben F.		Not previously assigned
Bovinet, Othal D.		Not previously assigned
Pattarozzi, Andrew		Not previously assigned
Halburnt, Henry		Not previously assigned
George, Frank E.		Not previously assigned

Reed, Raymond W.	Blue Diamond Coal Co.
Eskins, Virgil	Not previously assigned
Carr, Arthur	Not previously assigned
McMillen, Ted	Not previously assigned
Bodart, Frank	Not previously assigned
Pataki, Elmer A.	Not previously assigned
Hornberger, Robert L.	Not previously assigned
Barrington, James	Not previously assigned
Hall, M.	Not previously assigned
Schanuel, John F.	Not previously assigned
Rurode, Walter H.	Not previously assigned
Neff, Bud	Not previously assigned
Noe, William H.	Blue Diamond Coal Co.
Pendleton, Joseph E.	Not previously assigned
Halsey, Paul K.	Latrobe Construction Co.
Phelps, Marion E.	Not previously assigned
Grizzel, Robert S.	Not previously assigned
Clark, Joseph	Not previously assigned
White, Paul	Not previously assigned
Hartwell, Charles W.	Not previously assigned

Previously Assigned Coal Operators for Miners Assigned to Peabody Coal Co. by WNPSC Letter Dated 09/16/96 (cont.)

Billings, William R.	Eastern Associated Coal Corp.
Dalton, Luther W.	Not previously assigned
Goad, Guy O.	Not previously assigned
Ashworth, Cloyse H.	Not previously assigned
Scott, G.	Island Creek Coal Co.
Clark, Bennie E.	Not previously assigned
Barnhart, John A.	Davon, Inc.
Taylor, Cyrus	Not previously assigned
Weaver, Clayton E.	Not previously assigned
Mussatto, Dominick	Not previously assigned
Wells, Wilson	Not previously assigned
Quinn, Harlan E.	Not previously assigned
Story, Melvin	Not previously assigned
Frischman, John M.	Not previously assigned

Hickman, John E.	Not previously assigned
Pizzola, William M.	Not previously assigned
Gore, Roy M.	Not previously assigned
Tucker, Clifton E.	Not previously assigned
Hammond, James H.	Not previously assigned
Lindley, Lance D.	Not previously assigned
Valentine, Aust	Not previously assigned
Willey, Harold M.	Zeigler Coal Co.
Chubb, Jack L.*	Peabody Coal Co.

(*WNPSC assigned Chubb to Peabody in Round 1, in letter dated 10/08/93. Upon review, WNPSC determined that assignment to Peabody was correct but assignment basis was incorrect. Instead of correcting assignment basis, WNPSC sent new assignment letter in Round 4, 09/16/96.)

Heil, Henry L.	Not previously assigned
Salmond, Robert J.	Not previously assigned
Saylor, Cecil	Not previously assigned
Manes, J.	Not previously assigned
Stewart, Wesley J.	Not previously assigned
Davis, Solmon	Not previously assigned
Petree, Simon	Not previously assigned
Bennett, Vernon	Not previously assigned
Henderson, Floyd	Blue Diamond Coal Co.
Wilson, Woodrow	Not previously assigned
Jessee, Thomas E.	Not previously assigned
Roark, Woodrow	Not previously assigned
Powers, George	Not previously assigned
Huddleston, Arthur S.	Blue Diamond Coal Co.
Parker, Ernest E.	Not previously assigned
Jackson, George L.	Not previously assigned

Previously Assigned Coal Operators for Miners Assigned to Peabody Coal Co. by WNPSC Letter Dated 09/16/96 (cont.)

Jackson, George L.	Not previously assigned
Chitwood, James E.	Not previously assigned
Hicks, Roy	Not previously assigned
Walker, Coble	Not previously assigned
Asher, Melvin	Not previously assigned
Patterson, Oscar	Not previously assigned
Collett, Finley	Not previously assigned
Carter, Hesper	Not previously assigned
Murray, Jessie E.	Not previously assigned
Evans, Edward S.	Not previously assigned
Asher, Asberry	Not previously assigned
Botkins, George E.	Not previously assigned
Hibbard, Willie	Not previously assigned
Wilson, Clabe C.	Not previously assigned
Monday, Dewey C.	Not previously assigned
Williamson, Robert W.	Not previously assigned
Weaver, Virgil C.	Not previously assigned
Tippitt, Edison	Not previously assigned
King, George W.	Not previously assigned
Campbell, Jessie L.	Not previously assigned
Hurst, Sterling S.	Not previously assigned
Hamblin, John E.	Not previously assigned
Douglas, Marshall H.	Not previously assigned
McNealy, Elmer	Not previously assigned

Brown, Elmer*	Not previously assigned

(*Incorrectly shown as Emmer Grown in prior correspondence)

Massey, Wade	Not previously assigned
Weaver, Judd	Not previously assigned
Hatfield, James M.	Blue Diamond Coal Co.
Sharp, James W.	Not previously assigned
Gilburth, Charles	Not previously assigned
Ellison, Ulysses H.	Not previously assigned
Byrge, Deles	Not previously assigned
Bean, Charles H.	Not previously assigned
Hatmaker, Edd M.	Not previously assigned
Perkins, Elbert	Not previously assigned
Lovett, Grance	Not previously assigned
Jorman, Joseph J.	Not previously assigned
Hawkins, Walter M.	Not previously assigned
Keathley, Rufus	Blue Diamond Coal Co.
Silcox, Forster	Blue Diamond Coal Co.
Maffioli, Frank	Not previously assigned

EIN: 13-2606920 Page 12 of 12

Previously Assigned Coal Operators for Miners Assigned to Peabody Coal Co. by SEPSC Letter Dated 09/22/97

MINER	SSN	PREVIOUSLY ASSIGNED OPERATOR
Knight, Fred A.		Consolidation Coal Co.
Dudley, Edd		Consolidation Coal Co.
Baird, J.W.		Blue Diamond Coal Co.
Henry, Walter G.		Consolidation Coal Co.
Ball, John		Yocum Creek Coal Co.
		Blue Diamond Coal Co.
Haviland, Albert M.		L.G. Wasson Coal Mining Corp.
Penman, James		Princeton Mining Co.
Lovitt, W.C.		Blue Diamond Coal Co.
McDonald, Louis M.		Consolidation Coal Co.
Simpson, Charlie L.		Blue Diamond Coal Co.
Rowe, Virgil G.		Blue Diamond Coal Co.
Goodman, Lawrence M.		Blue Diamond Coal Co.
Cooper, Talmage		Blue Diamond Coal Co.
Brown, General		Blue Diamond Coal Co.
Barnes, John		Not previously assigned
Walp. Earl		Blue Diamond Coal Co.
Elmore, J.		Blue Diamond Coal Co.
Baird, Zeb D.		Consolidation Coal Co.
Cordell, Hugh		Blue Diamond Coal Co.
McGhee, Odis A.		Blue Diamond Coal Co.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
AT OWENSBORO

CIVIL ACTION #4:99CV-201(M)

PEABODY COAL COMPANY, ET AL., PLAINTIFFS

v.

KENNETH S. APFEL, COMMISSIONER, SOCIAL SECURITY, DEFENDANT

DEFENDANT'S ANSWER TO COUNTS IV-VI OF PLAINTIFFS' COMPLAINT[1]

Defendant, Kenneth S. Apfel, Commissioner of the Social Security Administration, answers the Complaint for Declaratory and Injunctive Relief of Plaintiffs, Peabody Coal Company and Eastern ("EACC") as follows:

First Defense

Plaintiffs have failed to join parties needed for just adjudication under Rule 19.

Second Defense

Plaintiffs' claim is barred in part by the doctrine of laches.

---

[1] Pursuant to the parties' joint Stipulation of Dismissal Without Prejudice, the Court dismissed Counts I-III of plaintiffs' complaint by order dated February 8, 2000.

Third Defense

In response to the numbered paragraphs of the Complaint, Defendant states as follows:

THE PARTIES

1. Defendant is without knowledge or information sufficient to form a belief as to the allegations contained in this paragraph.

2. Defendant is without knowledge or information sufficient to form a belief as to the allegations contained in this paragraph.

3. Defendant admits the allegations contained in paragraph 3.

JURISDICTION AND VENUE

4. Paragraph four contains plaintiffs' legal conclusions, to which no response is required.

5. The first sentence of paragraph five contains plaintiffs' legal conclusion to which no response is required. With respect to the second sentence of paragraph five, defendant is without knowledge or information sufficient to form a belief as to the allegations.

THE COAL ACT

6. Paragraph six contains plaintiffs' legal conclusions to which no response is required. To the extent plaintiffs refer to the text of the Coal Industry Retiree Health Benefit Act of 1992 ("The Coal Act"), the statute speaks for itself.

7. Paragraph seven contains plaintiffs' legal conclusions to which no response is required. To the extent plaintiffs refer to the text of the Coal Act, the statute speaks for itself.

8. Paragraph eight contains plaintiffs' legal conclusions to which no response is required. To the extent plaintiffs refer to the text of the Coal Act, the statute speaks for itself.

9. Paragraph nine contains plaintiffs' legal conclusions to which no response is required. To the extent plaintiffs refer to the text of the Coal Act, the statute speaks for itself.

10. Paragraph ten contains plaintiffs' legal conclusions to which no response is required.

11. Paragraph eleven contains plaintiffs' legal conclusions to which no response is required. To the extent plaintiffs refer to the text of the Coal Act, the statute speaks for itself.

12. Paragraph twelve contains plaintiffs' legal conclusions to which no response is required. To the extent plaintiffs refer to the text of the Coal Act, the statute speaks for itself.

13. Paragraph thirteen contains plaintiffs' legal conclusions to which no response is required. To the extent plaintiffs refer to the text of the Coal Act, the statute speaks for itself.

14. Paragraph fourteen contains plaintiffs' legal conclusions to which no response is required. To the extent plaintiffs refer to the text of the Coal Act, the statute speaks for itself.

EASTERN ENTERPRISES V. APFEL

15. Paragraph fifteen contains plaintiffs' legal conclusions to which no response is required. To the extent plaintiffs refer to the Supreme Court's decision

in *Eastern Enterprises v. Apfel*, 118 S. Ct. 2131 (1998), the Supreme Court's decisions speaks for itself.

16. Paragraph sixteen contains plaintiffs' legal conclusions to which no response is required. To the extent plaintiffs refer to the Supreme Court's decision in *Eastern Enterprises v. Apfel*, 118 S. Ct. 2131 (1998), the Supreme Court's decision speaks for itself.

17. Defendant admits that he voided assignments of beneficiaries to assignees who were similarly situated to Eastern Enterprises. Defendant otherwise denies the allegations in this paragraph.

COUNT IV
(Peabody Coal and EACC)
Request for Declaratory Judgment Invalidating Beneficiary Assignments Made to Peabody Coal and EACC after Septebmer 30, 1993

32. *See* Defendant's Answer ¶¶ 1-17 *supra*.

33. Paragraph thirty three contains plaintiffs' legal conclusions to which no response is required. To the extent plaintiffs refer to the text of the Coal Act, the statute speaks for itself.

34. Paragraph thirty four contains plaintiffs' legal conclusions to which no response is required. To the extent a response is required, defendant denies the allegations in this paragraph.

35. Paragraph thirty five contains plaintiffs' legal conclusions to which no response is required. To the extent plaintiffs refer to the text of the Coal Act, the statute speaks for itself.

36. Paragraph thirty six contains plaintiffs' legal conclusions to which no response is required. To the

extent a response is required, defendant denies the allegations in this paragraph.

37. Paragraph thirty seven contains plaintiffs' legal conclusions to which no response is required. To the extent that plaintiffs refer to the decision in *Dixie Fuel Co. v. Apfel*, 171 F.3d 1052 (6th Cir. 1999), the opinion speaks for itself.

38. Defendant admits that some initial assignments were made to plaintiffs after September 30, 1993. Defendant otherwise denies the allegations in this paragraph.

39. Defendant admits that he has not applied the *Dixie Fuel* decision to plaintiffs. Defendant otherwise denies the allegations in this paragraph.

40. Paragraph forty contains plaintiffs' legal conclusions to which no response is required. To the extent plaintiffs refer to the text of the Coal Act, the statute speaks for itself.

COUNT V
(Peabody Coal and EACC)
Request for Injunctive Relief Barring Future Assignments from the Unassigned Pool

41. *See* Defendant's Answer ¶¶ 1-17, 32-40 *supra*.

42. Paragraph forty two contains plaintiffs' legal conclusions to which no response is required.

43. Defendant denies the allegations in this paragraph.

44. Paragraph forty four contains plaintiffs' legal conclusions to which no response is required.

COUNT VI
(Peabody Coal and EACC)
Declaration Invalidating the Coal Act Assignments of George Weaver, Bude Jarvis, William Barnett, Jewell Patterson, Jack Callor, Jarrett Shrewsbury, Michael Restic and Lovell Kelly

45. *See* Defendant's Answer ¶¶ 1-17, 32-44 *supra*.

46. Paragraph forty six contains plaintiffs' legal conclusions to which no response is required. To the extent plaintiffs refer to the text of the Coal Act, the statute speaks for itself.

47. Defendant admits the allegations in the first sentence of paragraph forty seven. Defendant denies the allegations in the second sentence of paragraph forty seven.

48. Defendant admits that by letter decisions he refused to withdraw the assignments of George Weaver and Bude Jarvis to EACC and William Barnett to Peabody. The letters speak for themselves. Otherwise, defendant denies the allegations in this paragraph.

49. Defendant admits the allegations in the first sentence of paragraph forty nine. Defendant denies the allegations in the second sentence of paragraph forty nine.

50. Defendant admits that by letter decisions he refused to withdraw the assignments of Jarrett Shrewsbury to EACC and Jack Callor to Peabody. The letters speak for themselves. Otherwise, defendant denies the allegations in this paragraph.

51. Paragraph fifty one contains plaintiffs' legal conclusions to which no response is required. To the ex-

tent a response is required, defendant denies the allegations in this paragraph.

52. Paragraph fifty two contains plaintiffs' legal conclusions to which no response is required. To the extent a response is required, defendant denies the allegations in this paragraph.

53. Defendant denies the allegations contained in this paragraph.

54. Defendant admits that by letter decision he refused to withdraw the assignments of Michael Restic and Virgil Kelley to EACC. The letter speaks for itself. Defendant otherwise denies the allegations in this paragraph.

55. Paragraph fifty five contains plaintiffs' legal conclusions to which no response is required. To the extent a response is required, defendant denies the allegations in this paragraph.

56. Paragraph fifty six contains plaintiffs' legal conclusions to which no response is required.

The rest of the Complaint contains Plaintiffs' Prayer for Relief, to which no response is required. If a response is required, Defendant denies that Plaintiffs are entitled to the relief requested.

Defendant denies each and every allegation not heretofore expressly admitted, qualified, or denied by this Answer.

WHEREFORE, Defendant respectfully requests that this action be dismissed with prejudice.

Respectfully submitted,

DAVID W. OGDEN
Acting Assistant Attorney General

STEVE REED
United States Attorney

JOHN E. KUHN, JR.
Assistant United States Attorney

/s/ BENJAMIN P. COOPER
RICHARD LEPLEY
BENJAMIN P. COOPER
Attorneys
United States Department of Justice
Civil Division
P.O. Box 883, Room 946
Washington, D.C. 20044
Telephone: (202) 514-1285

Attorneys for Defendant

Dated: February 29, 2000

UNITED STATES DISTRICT COURT FOR
THE SOUTHERN DISTRICT OF OHIO (COLUMBUS)

No. 99-CV-532

BELLAIRE CORPORATION, ET AL., PLAINTIFF

v.

APFEL, ET AL., DEFENDANT

RELEVANT DOCKET ENTRIES

DATE	DOCKET NUMBER	PROCEEDINGS
6/4/99	1	COMPLAINT (referred to Mag Judge Norah M King) (no. pgs: 27 + exhibits A through NNN) (wh) [Entry date 06/10/99]
11/8/99	8	MOTION by UMWA Combined Bene to intervene (no pgs: 11 + exhibits) (wh) [Entry date 11/09/99]
11/29/99	10	MEMO IN OPPO by plaintiff to motion to intervene [8-1] (no pgs: 14) (wh) [Entry date 11/30/99]

DATE	DOCKET NUMBER	PROCEEDINGS
11/30/99	11	ANSWER by defendant (no pgs: 23) (wh) [Entry date 12/02/99]
12/13/99	12	REPLY by UMWA Benefit Plan, UMWA Combined Bene, Bellaire Corporation to response to motion to intervene [8-1] (no pgs: 8) (wh) [Entry date 12/15/99]
4/5/00	14	MOTION by plaintiffs for preliminary injunction, for permanent injunction, for partial summary judgment, and for judgment (no pgs: 14 + exh) (pl) [Entry date 04/06/00]
4/7/00	15	OPINION AND ORDER: by Senior Judge Joseph P. Kinneary granting motion to intervene [8-1] Trustees of UMWA (cc: all counsel) (no pgs: 8) (pl) [Entry date 04/07/00]
4/7/00	16	ANSWER by intervenor-defendant Trustees of UMWA (no pgs: 3) (pl) [Entry date 04/07/00]

DATE	DOCKET NUMBER	PROCEEDINGS
5/1/00	17	RESPONSE by defendant Kenneth S Apfel to motion for preliminary injunction [14-1], motion for partial summary judgment [14-3], motion for judgment [14-4] (no pgs: 19 + exh) (pl) [Entry date 05/02/00]
5/9/00	18	MOTION by plaintiff Bellaire Corporation, plaintiff NACCO Industries Inc for preliminary injunction, for permanent injunction, for partial summary judgment and final judgment against intervenor dft Trustees of the UMWA combined benefit fund (no pgs: 5) (sm) [Entry date 05/10/00]
5/12/00	19	REPLY by plaintiff Bellaire Corporation, plaintiff NACCO Industries Inc, plaintiff North American Coal to response to motion for preliminary injunction [14-1], motion for permanent injunction [14-2], motion for partial summary judgment [14-3], motion for judgment [14-4] (no pgs: 10) (pl) [Entry date 05/15/00]

DATE	DOCKET NUMBER	PROCEEDINGS
6/2/00	20	RESPONSE by intervenor-defendant Trustees of UMWA to motion for preliminary injunction [18-1], motion for permanent injunction [18-2], motion for partial summary judgment and final judgment [18-3] (no pgs: 14 + exh) (pl) [Entry date 06/05/00]
6/16/00	21	REPLY by plaintiff to response to motion for preliminary injunction [18-1], motion for permanent injunction [18-2], motion for partial summary judgment and final judgment [18-3] (no pgs: 7) (gk) [Entry date 06/19/00]
6/30/00	31	OPINION AND ORDER: by Senior Judge Joseph P. Kinneary granting motion for preliminary injunction [18-1], granting motion for permanent injunction [18-2], granting motion for partial summary judgment and final judgment [18-3], granting motion for preliminary injunction [14-1], granting motion for permanent

DATE	DOCKET NUMBER	PROCEEDINGS
		injunction [14-2], granting motion for partial summary judgment [14-3], granting motion for judgment [14-4] as to Count IV; Clerk to enter Final Judgment as to Count IV of the Complaint (cc: all counsel) (no pgs: 14) (pl) [Entry date 06/30/00] [Edit date 06/30/00]
6/30/00	32	JUDGMENT: entered granting partial summary judgment and injunction as to Count IV of the Complaint in favor of the Bellaire Groups (cc: all counsel) (no pgs: 1) (pl) [Entry date 06/30/00] [Edit date 06/30/00]
8/25/00	37	NOTICE OF APPEAL by defendant Kenneth S Apfel from Dist. Court decision [32-1] of 06/30/00 (no pgs: 3) (slh) [Entry date 08/28/00]
8/25/00	38	NOTICE OF APPEAL by intervenor-defendant Trustees of UMWA from Dist. Court decision [32-1] of 06/30/00 (no pgs: 3) (slh) [Entry date 08/28/00]

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 00-4082

BELLAIRE CORPORATION; NACCO INDUSTRIES, INC.; NORTH AMERICAN COAL CORPORATION, PLAINTIFFS-APPELLEES

v.

KENNETH S. APFEL, COMMISSIONER OF SOCIAL SECURITY; DEFENDANT

MICHAEL H. HOLLAND; WILLIAM P. HOBGOOD; MARTY D. HUDSON; THOMAS O.S. RAND; ELLIOT A. SEGAL; CARL E. VAN HORN; GAIL R. WILENSKY, AS THE TRUSTEES OF THE UMWA COMBINED BENEFIT FUND INTERVENING DEFENDANTS-APPELLANTS

RELEVANT DOCKET ENTRIES

DATE	PROCEEDINGS
8/30/00	Civil Case Docketed. Notice filed by Appellant Michael H. Holland, Appellant William P. Hobgood, Appellant Marty D. Hudson, Appellant Thomas O.S. Rand, Appellant Elliot A. Segal, Appellant Carl E. Van Horn, Appellant Gail R. Wilensky. Transcript needed: n ❑ (cf)
10/24/00	PETITION for en banc hearing filed by Jeffrey Clair for Appellant Kenneth S. Apfel. Certificate of service date 10/5/00. [00-4080, 00-4082] (blh)

DATE	PROCEEDINGS
11/3/00	PETITION for en banc hearing filed by Peter Buscemi for Appellants Gail R. Wilensky, Carl E. Van Horn, Elliot A. Segal, Thomas O.S. Rand, Marty D. Hudson, William P. Hobgood, Michael H. Holland. Certificate of service date 11/1/00. [00-4080, 00-4082] (blh)
12/6/00	ORDER filed denying petition for en banc hearing [2250528-1] filed by Peter Buscemi and petition for en banc hearing [2243349-1] filed by Jeffrey Clair [00-4080, 00-4082]. Entered by order of the court. (blh)
2/16/01	PROOF BRIEF filed by John R. Mooney for Appellant Gail R. Wilensky, Appellant Carl E. Van Horn, Appellant Elliot A. Segal, Appellant Thomas O.S. Rand, Appellant Marty D. Hudson, Appellant William P. Hobgood, Appellant Michael H. Holland, Peter Buscemi for Appellant Gail R. Wilensky, Appellant Carl E. Van Horn, Appellant Elliot A. Segal, Appellant Thomas O.S. Rand, Appellant Marty D. Hudson, Appellant William P. Hobgood, Appellant Michael H. Holland. Certificate of service date 2/12/01. Number of Pages: 46. [00-4082] ❑ (vf)

DATE	PROCEEDINGS
3/6/01	PROOF BRIEF filed by Brian G. Selden and Jeffrey S. Sutton for Appellee N Amer Coal Corp, Appellee Nacco Indust, Appellee Bellaire Corp. Certificate of service date 3/5/01. Number of Pages: 33. [00-4080, 00-4082] _ (vf)
3/14/01	REPLY BRIEF filed by John R. Mooney for Appellant Gail R. Wilensky, Appellant Carl E. Van Horn, Appellant Elliot A. Segal, Appellant Thomas O.S. Rand, Appellant Marty D. Hudson, Appellant William P. Hobgood, Appellant Michael H. Holland, Peter Buscemi for Appellant Gail R. Wilensky, Appellant Carl E. Van Horn, Appellant Elliot A. Segal, Appellant Thomas O.S. Rand, Appellant Marty D. Hudson, Appellant William P. Hobgood, Appellant Michael H. Holland. Copies: 7. Certificate of service date 3/12/01. [00-4082] (vf)
4/12/01	CAUSE SUBMITTED on briefs to panel consisting of Judges Martin, Norris, Quist sitting on 6/13/01. [00-4080, 00-4082] (srw)
6/22/01	Per Curiam OPINION filed: AFFIRMED [00-4080, 00-4082], decision not for publication pursuant to local rule 28(g) [00-4080, 00-4082]. Boyce F. Martin, Jr., Chief Judge, Alan E. Norris, Circuit Judge, Gordon J. Quist, District Judge. (cf)

DATE	PROCEEDINGS
11/28/01	U.S. Supreme Court notice filed regarding petition for writ of certiorari, filed by William A. Halter, Comm. SS in the Supreme Court on 11//19/01, Supreme Ct. case number: 01-705. [00-4082] (swh)
1/24/02	MANDATE ISSUED with no cost taxed [00-4082] (dac)
1/30/02	U.S. Supreme Court letter filed denying [*sic*] petition for writ of certiorari [2462687-1] filed by William A. Halter [00-4082]. Filed in the Supreme Court on 01-20-02. (swh)

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO

Civil Action No. C2-99 532
JUDGE KINNEARY
MAGISTRATE JUDGE KING

BELLAIRE CORPORATION, NACCO INDUSTRIES, INC. AND THE NORTH AMERICAN COAL CORPORATION,
PLAINTIFFS

v.

KENNETH S. APFEL, COMMISSIONER OF SOCIAL SECURITY, DEFENDANT

[Filed: Jun 4, 1999]

COMPLAINT

Plaintiffs, Bellaire Corporation ("Bellaire"), NACCO Industries, Inc. ("NACCO") and The North American Coal Corporation ("North American") through their undersigned counsel, hereby file the following Complaint against the Defendant, Kenneth S. Apfel, Commissioner of Social Security ("Commissioner"):

INTRODUCTION

1. This case involves several different challenges to the Commissioner's actions under the Coal Industry Retiree Health Benefit Act of 1992 ("Coal Act"), 26 U.S.C. Section 9701 *et seq.* The Commissioner has made the majority of the contested assignments to Bellaire under EIN 34-0431290 and a lesser number to each of NACCO under EIN 34-1505819 and North American under EIN 34-1554846. Of the three, only

Bellaire is a signatory operator as defined in the Coal Act. NACCO and North American are merely related persons, within the meaning of the Coal Act, to Bellaire. Neither NACCO or North American ever employed any miner assignable under the Coal Act. Bellaire has prepared and filed all the administrative appeals referenced herein, regardless of which company received the assignment from the Commissioner. Hereafter all three companies are referred to as the Bellaire Group, unless specific reference is made to one of the individual companies.

2. Counts I and II of the Complaint concern the Commissioner's wrongful assignment of miners (and their dependents) to the Bellaire Group under Sections 9706(a) of the Coal Act, that never worked for or had any relationship with the Bellaire Group and, instead, worked for Independent Coal & Coke Company ("ICC") or Cambria Mining Company ("Cambria"). These assignments were arbitrary, capricious, an abuse of discretion, not in accordance with law, unwarranted by the facts, unsupported by the evidence, plainly erroneous, and contained errors apparent from the face of the Social Security Administration's ("SSA") own records and/or from other information available to SSA because, among other things, the basis on which the Commissioner assigned the miners (and their dependents) to the Bellaire Group—that it was ICC's and Cambria's successor—is not a permissible basis for assigning miners and dependents under Section 9706(a) of the Coal Act as a matter of law.

3. Count III of the Complaint concerns the Commissioner's wrongful failure to void the assignment of the ICC and Cambria miners (and their dependents) to the Bellaire Group based on the Supreme Court's

decision in *Eastern Enterprises v. Apfel*, 118 S. Ct. 2131 (1998). In *Eastern*, the Supreme Court ruled that the assignment of miners to an operator that last signed a Coal Wage Agreement in 1964 was unconstitutional. Based on *Eastern*, the Commissioner subsequently voided several thousand assignments to 124 operators that last signed Coal Wage Agreements before 1974. Here, ICC last signed a Coal Wage Agreement in 1966 and Cambria last signed a Coal Wage Agreement in 1954. Therefore, ICC and Cambria are materially indistinguishable from Eastern Enterprises in regards to the Coal Act and, had the ICC and Cambria miners (and their dependents) been assigned directly to these companies, the Commissioner would have voided them based on *Eastern*. As a result, the assignments to the Bellaire Group of ICC and Cambria miners (and their dependents) equally should have been voided based on *Eastern*, and the Commissioner's refusal to do so was arbitrary, capricious, an abuse of discretion, not in accordance with law, unwarranted by the facts, unsupported by the evidence, and plainly erroneous.

4. Count IV of the Complaint concerns the Commissioner's unlawful making of original assignments to the Bellaire Group after September 30, 1993. The Coal Act authorizes the Commissioner to make original assignments only "before October 1, 1993." 26 U.S.C. § 9706(a). After September 30, 1993, the Commissioner's making of any additional original assignments to the Bellaire Group was arbitrary, capricious, an abuse of discretion, not in accordance with law and plainly erroneous, because it was contrary to the express language of the Coal Act.

5. Count V of the Complaint concerns the Commissioner's wrongful refusal to revoke various indivi-

dual assignments of miners (and their dependents) to the Bellaire Group. The assignments which are the subject of each of this Count were erroneous for the reasons set forth in the Bellaire Group's administrative appeals, which the Commissioner wrongly denied. These assignments and the Commissioner's refusal to revoke each of them, therefore, were arbitrary, capricious, an abuse of discretion, not in accordance with law, unwarranted by the facts, unsupported by the evidence, and plainly erroneous.

6. Count VI of the Complaint concerns the Commissioner's unlawful reassignment of miners and dependents among members of the Bellaire group. The liability of Bellaire and other members of the Bellaire Group, including North American and NACCO, is joint and several under the Coal Act, but is exclusively premised upon prior employment relationships which only Bellaire ever had with any retired miners or asset acquisitions to which only Bellaire was a party. Therefore, no member of the Bellaire Group can have any basis of liability different than Bellaire itself has; either all members are equally liable or no member is liable. Thus, whenever an assignment of a miner and/or his dependent is revoked by the Commissioner as to any member of the Bellaire Group, whether Bellaire itself, North American or NACCO, that final decision precludes reassignment of the same miner and/or dependents to another member of the Bellaire Group. Such reassignments constitute "double jeopardy" and undermine the finality of administrative decisions previously rendered by the Commissioner. Therefore, all such reassignments within the Bellaire Group are arbitrary, capricious, an abuse of discretion, not in accordance with law, unwarranted by the facts, unsupported by the

evidence, plainly erroneous and invalid as a matter of law.

PARTIES

7. Plaintiff Bellaire is a corporation organized under the laws of the state of Ohio with its principal place of business located at Signature Place II, 14785 Preston Road, Suite 1100, Dallas, Texas 75240-7891, but maintains an office at 155 Highway 7, Powhatan Point, Ohio 43942. Bellaire formerly operated bituminous coal mines and associated facilities located in Belmont County, Ohio, and in other locations.

8. Plaintiff NACCO is a corporation organized under the laws of the state of Delaware, with its principal place of business located at 5875 Landerbrook, Suite 300, Mayfield Heights, Ohio 44124. NACCO is the parent corporation of Bellaire.

9. Plaintiff North American is a corporation organized under the laws of the state of Delaware, with its principal place of business located at Signature Place II, 14785 Preston Road, Suite 1100, Dallas, Texas 75240-7891, but maintains an office at 155 Highway 7, Powhatan Point, Ohio 43942. North American is a subsidiary of NACCO.

10. Defendant Kenneth S. Apfel is the Commissioner of Social Security. The Commissioner maintains his principal office at Room 900, Altmeyer Building, 6401 Security Boulevard, Baltimore, Maryland 21235. The Commissioner is responsible for the oversight of the SSA.

JURISDICTION AND VENUE

11. Jurisdiction over this action arises under 28 U.S.C. Sections 1331, 1346, and 1361, as well as 5 U.S.C. Section 702.

12. Venue lies in this District under 28 U.S.C. § 1391.

THE ASSIGNMENT PROCESS UNDER THE COAL ACT

13. Section 9706(a) of the Coal Act, 26 U.S.C. Section 9706(a), requires the Commissioner to assign certain retired coal miners and their dependents to "signatory operators" who "remain in business," and if the signatory operator" is no longer "in business," to that signatory operator's "related persons." Thereafter, pursuant to Section 9704(a) of the Coal Act, 26 U.S.C. Section 9704(a), the United Mine Workers of America Combined Benefit Fund charges that signatory operator (or related person) a specified annual premium for each assigned beneficiary.

14. The formula the Commissioner uses to assign miners under Section 9706(a) of the Coal Act, 26 U.S.C. Section 9706(a), provides as follows:

> (a) In general. For purposes of this chapter, the Commissioner of Social Security shall, before October 1, 1993, assign each coal industry retiree who is an eligible beneficiary to a signatory operator which (or any related person with respect to which) remains in business in the following order:
>
> (1) First, to the signatory operator which—

> (A) was a signatory to the 1978 coal wage agreement or any subsequent coal wage agreement, and
>
> (B) was the most recent signatory operator to employ the coal industry retiree in the coal industry for at least 2 years.
>
> (2) Second, if the retiree is not assigned under paragraph (1), to the signatory operator which—
>
> (A) was a signatory to the 1978 coal wage agreement or any subsequent coal wage agreement, and
>
> (B) was the most recent signatory operator to employ the coal industry retiree in the coal industry.
>
> (3) Third, if the retiree is not assigned under paragraph (1) or (2), to the signatory operator which employed the coal industry retiree in the coal industry for a longer period of time than any other signatory operator prior to the effective date of the 1978 coal wage agreement.
>
> (b) Rules relating to employment and reassignment upon purchase.
>
> For purposes of subsection (a)—
>
> (1) Aggregation rules.
>
> (A) Related person. Any employment of a coal industry retiree in the coal industry by a

signatory operator shall be treated as employment by any related persons to such operator.

(B) Certain employment disregarded. Employment with—(i) a person which is (and all related person with respect to which are) no longer in business. . . .

15. For purposes of Section 9706 of the Coal Act, the term "signatory operator" is defined in Section 9701(c)(1) of the Coal Act, 26 U.S.C. Section 9701(c)(1), to mean "a person which is or was a signatory to a coal wage agreement." Additionally, the term "in business" is defined in Section 9701(c)(7) of the Coal Act, 26 U.S.C. Section 9701(c)(7), to mean that "a person shall be considered to be in business if such person conducts or derives revenue from any business activity, whether or not in the coal industry."

16. For purposes of Section 9706 of the Coal Act, the term "coal wage agreement" is defined, by Section 9701(b)(1) of the Coal Act, 26 U.S.C. Section 9701(b)(1), to mean either (a) the National Bituminous Coal Wage Agreement, or (b) any other agreement entered into between an employer in the coal industry and the United States Mine Workers of America that required or requires one or both of the following:

(i) the provision of health benefits to retirees of such employer, eligibility for which is based on years of service credited under a plan established by the settlors and described in Section 404(c) or a continuation of such plan; or

(ii) contributions to the 1950 UMWA Benefit Plan or the 1974 UMWA Benefit Plan, or any predecessor thereof.

17. For purposes of Section 9706 of the Coal Act, 26 U.S.C. Section 9706, the term "related person" is defined by Section 9701(c)(2), 26 U.S.C. Section 9701(c)(2), as including:

(A) In General. A person shall be considered to be a related person to a signatory operator if that person is—

(i) a member of the controlled group of corporations (within the meaning of Section 52(a)) which includes the signatory operator;

(ii) a trade or business which is under common control with such signatory operator (as determined under Section 52(b));

(iii) any other person who is identified as having a partnership interest or joint venture with a signatory operator in a business within the coal industry, but only if such business employed eligible beneficiaries, except that this clause shall not apply to a person whose only interest is as a limited partner.

A related person shall also include a successor in interest of any person described in clause (i), (ii), or (iii).

(B) Time for determination. The relationships described in clauses (i), (ii), and (iii) of subparagraph (A) shall be determined as of July 20, 1992, except that if, on July 20, 1992, a signatory operator is no longer in business, the relationships shall be determined as of the time immediately before such operator ceased to be in business.

COUNT I

18. The Bellaire Group hereby incorporates the averments set forth in paragraphs 1 through 17, above.

19. The Commissioner has issued Internal Guidelines for handling assignments under the Coal Act. In these Guidelines the Commissioner has concluded that, among other things, if the signatory operator that employed a miner and its related persons is no longer in business, then the miner (and his dependents) can be assigned to the signatory operator's successor(s) under Section 9706(a) of the Coal Act. The Commissioner reasons that, in these circumstances, the successor is one of the signatory operator's "related persons" under Section 9702(c)(2) of the Coal Act.

20. The Commissioner has assigned numerous ICC miners (and their dependents) to the Bellaire Group on the basis that it is a successor to ICC. The Bellaire Group administratively appealed each such assignment, most of which the Commissioner refused to revoke in a series of final decisions. The specific ICC miners and dependents, the date of the Bellaire Group appeals and the date of the Commissioner's final negative administrative decisions are set forth in a chart attached hereto and incorporated herein as Exhibit A.

21. The Commissioner assigned the ICC miners and their dependents to the Bellaire Group because (a) he determined that the signatory operator that had employed the miners under a Coal Wage Agreement—ICC—would have received the assignments, but it was no longer in business, (b) none of ICC's "related persons" were still in business, and (c) the Bellaire Group was ICC's successor with respect to these miners because, in 1968, a member of the Bellaire Group acquired

the coal mining assets which ICC formerly had owned and operated.

22. The Bellaire Group never shared any common ownership with ICC, nor were they partners of any sort. Therefore, the Bellaire Group was never a "related person" to ICC under Section 9702(c)(2) of the Coal Act.

23. The Bellaire Group's sole contact with ICC was that in 1968 a member of the Group purchased the coal mining assets that ICC had owned and operated. A copy of the acquisition documents was provided to the Commissioner in support of the Bellaire Group's appeal of the assignments to it of each of the ICC miners referenced on Exhibit A. A copy of the acquisition documents is attached hereto as Exhibit A-1.

24. Regulations issued at 20 C.F.R. Section 422.604, provide that once the Commissioner notifies an operator that it has been assigned miners, the operator may, within thirty (30) days, request additional information concerning the work histories of the miners and the basis for the assignments.

25. The Bellaire Group timely requested information concerning each of the ICC miners referenced on Exhibit A.

26. The Bellaire Group appealed the assignments to it of each of the ICC miners referenced on Exhibit A. Each such appeal was timely made, including the appeal relating to ICC miner Martin A. Vuksinick, SSN [redacted], who the Bellaire Group reasonably believed to be deceased and therefore did not initially appeal. Upon learning that Mr. Vuksinick was not deceased, the Bellaire Group promptly and timely, measured from

the date it gained such knowledge, administratively appealed as to Mr. Vuksinick as well.

27. By several letters dated June 6, 1994; November 28, 1994; April 3, 1996; August 15, 1996; August 16, 1996; September 11, 1996; June 27, 1997; July 8, 1998; and August 13, 1998, the Bellaire Group provided information in support of its requests for review of the ICC miner assignments. In each such letter, the Bellaire Group showed that the assignments of ICC miners appealed in the particular letter were improper because the Coal Act did not permit the Commissioner to assign miners to successors, such as the Bellaire Group, as a matter of law. Copies of the appeal letters relating to the ICC miners referred to on Exhibit A are attached hereto as Exhibits D, E, F, H, J, L, N, O, Q, S, U, W and MMM.

28. By several letters dated June 28, 1995; July 10, 1995; March 27, 1997; June 19, 1997; November 25, 1997; February 12, 1998; February 20, 1998; July 17, 1998; September 1, 1998; and April 19, 1999, the Commissioner issued final decisions in which he notified the Bellaire Group that he would not revoke the assignment of any of the ICC miners referred to on Exhibit A. Copies of the final decisions relating to the ICC miners are attached as Exhibits G, I, K, M, P, R, T, V, X and NNN.

29. The Commissioner's final decisions that are referenced in the foregoing paragraph were arbitrary, capricious, an abuse of discretion, not in accordance with law, unwarranted by the facts, unsupported by the evidence, plainly erroneous, and contained errors apparent from the face of the Commissioner's own records and/or from other information available to the

Commissioner for reasons including, but not limited to, the following:

(a) The Commissioner cannot, as a matter of law, assign miners to successors under Section 9706(a) of the Coal Act; and

(b) The Bellaire Group's inadvertent delay in appealing the assignment of the ICC miner Martin A. Vuksinick, SSN [redacted], to the Bellaire Group was harmless error and, therefore, is not a legitimate basis upon which the Commissioner can refuse to review the assignment, particularly given the extent to which the Commissioner routinely gives extensions and his own delays in processing requests for information and review.

30. The Commissioner's improper assignments of the ICC miners (and their dependents) to the Bellaire Group, and his improper failure to review (in one case) and revoke (in all cases) the same, has caused the Bellaire Group to incur premium obligations and other expenses and harm that it would not have incurred if the Commissioner has properly performed his duties under Section 9706 of the Coal Act.

COUNT II

31. The Bellaire Group hereby incorporates the averments set forth in paragraphs 1 through 30, above.

32. The Commissioner has issued Internal Guidelines for handling assignments under the Coal Act. In these Guidelines, the Commissioner has concluded that, among other things, if the signatory operator that employed a miner and its related persons is no longer in business, then the miner (and his dependents) can be

assigned to the signatory operator's successor(s) under Section 9706(a) of the Coal Act. The Commissioner reasons that, in these circumstances, the successor is one of the signatory operator's "related persons" under Section 9702(c)(2) of the Coal Act.

33. The Commissioner has assigned numerous Cambria miners (and their dependents) to the Bellaire Group on the basis that it is a successor to Cambria. The Bellaire Group administratively appealed each such assignment, all of which the Commissioner refused to revoke in a series of final decisions. The specific Cambria miners and dependents, the date of the Bellaire Group's appeals and the date of the Commissioner's final negative administrative decisions are set forth in a chart attached hereto and incorporated herein as Exhibit B.

34. The Commissioner assigned the Cambria miners and their dependents to the Bellaire Group because (a) he determined that the signatory operator that had employed the miners under a Coal Wage Agreement—Cambria—would have received the assignments, but it was no longer in business, (b) none of Cambria's "related persons" were still in business, and (c) the Bellaire Group was Cambria's successor with respect to these miners because, in 1954, a member of the Bellaire Group acquired the coal mining assets which Cambria formerly had owned and operated.

35. The Bellaire Group never shared any common ownership with Cambria, nor were they partners of any sort. Therefore, the Bellaire Group was never a "related person" to Cambria under Section 9702(c)(2) of the Coal Act.

36. The Bellaire Group's sole contact with Cambria was that in 1954 a member of the Group purchased the coal mining assets that Cambria had owned and operated. A copy of the acquisition document was provided to the Commissioner in support of the Bellaire Group's appeal of the assignment to it of each of the Cambria miners referenced on Exhibit B. A copy of the acquisition document is attached hereto as Exhibit B-1.

37. Regulations issued at 20 C.F.R. Section 422.604, provide that once the Commissioner notifies an operator that it has been assigned miners, the operator may, within thirty (30) days, request additional information concerning the work histories of the miners and the basis for the assignments.

38. The Bellaire Group timely requested information concerning each of the Cambria miners referenced on Exhibit B.

39. The Bellaire Group appealed the assignments to it of each of the Cambria miners referenced on Exhibit B. Each such appeal was timely made.

40. By several letters dated June 6, 1994; November 21, 1994; November 28, 1994; August 15, 1996; August 16, 1996; and June 27, 1997, the Bellaire Group provided information in support of its request for review of the Cambria miner assignments. In each such letter, the Bellaire Group showed that the assignments of Cambria miners appealed in the particular letter were improper because the Coal Act did not permit the Commissioner to assign miners to successors, such as the Bellaire Group, as a matter of law. Copies of the appeal letters relating to the Cambria miners referred to on Exhibit B are attached as Exhibits D, H, J, N, U, W, Y and DD.

41. By several letters dated June 28, 1995; July 10, 1995; August 19, 1996; March 27, 1997; May 14, 1997; November 25, 1997; February 12, 1998; April 1, 1998 and September 1, 1998, the Commissioner issued final decisions in which he notified the Bellaire Group that he would not revoke the assignment of any of the Cambria miners referred to herein. Copies of the final decisions relating to the Cambria miners referred to on Exhibit B are attached hereto as Exhibits G, I, K, P, V, X, Z and EE.

42. The Commissioner's final decisions that are referenced in the foregoing paragraph were arbitrary, capricious, an abuse of discretion, not in accordance with law, unwarranted by the facts, unsupported by the evidence, plainly erroneous, and contained errors apparent from the face of the Commissioner's own records and/or from other information available to the Commissioner for reasons including, but not limited to, the following:

(a) The Commissioner cannot, as a matter of law, assign miners to successors under Section 9706(a) of the Coal Act.

43. The Commissioner's improper assignments of the Cambria miners (and their dependents) to the Bellaire Group, and his improper failure to revoke the same, has caused the Bellaire Group to incur premium obligations and other expenses and harm that it would not have incurred if the Commissioner has properly performed his duties under Section 9706 of the Coal Act.

COUNT III

44. The Bellaire Group hereby incorporates the averments of paragraphs 1 through 43, above.

45. In *Eastern Enterprises v. Apfel*, 118 S. Ct. 2131 (1998), the Supreme Court held that the Coal Act was unconstitutional as applied to a signatory operator that last signed the National Bituminous Coal Wage Agreement of 1964.

46. Following the Supreme Court's decision in *Eastern*, the Commissioner voided assignments to at least 124 signatory operators on the basis that the assignments were unconstitutional because, like Eastern Enterprises, those operators had last signed Coal Wage Agreements before 1974. Upon information and belief, a number of the 124 companies so relieved had not requested relief pursuant to *Eastern*.

47. ICC last signed the National Bituminous Coal Wage Agreement of 1966.

48. Cambria last signed the National Bituminous Coal Wage Agreement of 1950.

49. In several instances, the Commissioner has taken the position that assignments under Section 9706(a) of the Coal Act are based on the signatory status of the company that employed the miner, not the signatory status of any allegedly related company.

50. If ICC was still in business when the assignments at issue here were made, then the assignments referred to on Exhibit A would have been made directly to ICC and the Commissioner would have voided them under the Commissioner's application of *Eastern*.

51. If Cambria was still in business when the assignments at issue here were made, then the assignments referred to on Exhibit B would have been made directly to Cambria and the Commissioner would have voided them under the Commissioner's application of *Eastern*.

52. Nonetheless, the Commissioner did not void the assignments of the ICC and Cambria miners (and their dependents) to the Bellaire Group.

53. The Commissioner's disparate treatment of the Bellaire Group in failing to void the ICC and Cambria assignments to the Bellaire Group while he sua sponte applied *Eastern* to others was arbitrary, capricious, an abuse of discretion, not in accordance with law, unwarranted by the facts, unsupported by the evidence, plainly erroneous, and contained errors apparent from the face of the Commissioner's own records and/or from other information available to the Commissioner for reasons including, but not limited to:

(a) ICC and Cambria are materially indistinguishable from Eastern Enterprises and, as a result, there is no legitimate basis for not voiding the assignments of the ICC and Cambria miners; and

(b) The Commissioner's decision to ignore the signatory status of related persons for assignment purposes necessarily means that the Bellaire Group's signatory status is equally irrelevant to the constitutionality of the assignments of the ICC and Cambria miners (and dependents), *i.e.*, only ICC's and Cambria's signatory status is material to that analysis, and that status required the Commissioner to include these assignments with those he voided based on the decision in *Eastern*.

54. The Commissioner's improper refusal to void the assignments to the Bellaire Group of the ICC and Cambria miners (and their dependents) has caused the Bellaire Group to incur attorney's fees, costs, premium obligations and other expenses and harm that it would not have incurred if the Commissioner had properly performed his duties under Section 9706 of the Coal Act.

COUNT IV

55. The Bellaire Group hereby incorporates the averments of paragraphs 1 through 54, above.

56. The Coal Act requires the Commissioner to have completed the original assignment process "before October 1, 1993." 26 U.S.C. § 9706(a).

57. The Coal Act does not authorize the Commissioner to make any original assignments after September 30, 1993.

58. The Coal Act does authorize the Commissioner to reassign after September 30, 1993 miners and their dependents who originally were assigned to a signatory operator before October 1, 1993, but who were the subject of a successful administrative appeal by the originally assigned signatory operator.

59. Upon information and belief, the Commissioner did not make any reassignments until an unknown date in 1995, at the earliest.

60. The Bellaire Group avers on the basis of information and belief that the Commissioner made original assignments to the Bellaire Group after September 30, 1993 and in violation of the Coal Act's express terms on a number of occasions. The specific miners and dependents presently believed to have been the subject

of original assignments after September 30, 1993 and the dates of their respective assignments to the Bellaire Group are set forth in a chart attached hereto and incorporated herein as Exhibit C. The Commissioner's presently known unlawful original assignments to the Bellaire Group referred to in this paragraph were made in several letters dated after September 30, 1993. Copies of these assignment letters referred to on Exhibit C are attached hereto as Exhibits PP through YY.

61. In addition to the miners and dependents referenced in paragraph 60 above, the Bellaire Group believes that the Commissioner may have made other original assignments to it in 1995 and later, but cannot presently identify those additional unlawful assignments because the Commissioner does not disclose at the time an assignment is made whether it is an original assignment or a reassignment.

62. The Commissioner's making of original assignments after September 30, 1993 presents a pure question of law as to which a request for administrative review would have been futile, because the Commissioner had already predetermined the issue against all signatory operators and related persons, including the members of the Bellaire Group.

63. The Commissioner's original assignments made to the Bellaire Group after September 30, 1993, were arbitrary, capricious, an abuse of discretion, not in accordance with law, unwarranted by the facts, unsupported by the evidence, plainly erroneous and contained errors apparent from the face of the Commissioner's own records and/or from other information available to the Commissioner.

64. The Commissioner's unlawful original assignments of miners and their dependents to the Bellaire Group after September 30, 1993 has caused the Bellaire Group to incur premium obligations and other expenses and harm that it would not have incurred if the Commissioner had properly performed his duties under Section 9706 of the Coal Act.

COUNT V

65. The Bellaire Group hereby incorporates the averments in paragraphs 1 through 64, above.

66. The Commissioner has assigned numerous individual miners (and their dependents) to the Bellaire Group on the basis that the Bellaire Group has the highest assignment priority under Section 9706(a) of the Coal Act with respect to such miners. The Bellaire Group administratively appealed a number of such assignments on the basis that some other employer not related to the Bellaire Group in fact had a higher assignment priority and that the other employer or a related person remained in business and should receive the assignment. This Count concerns the Bellaire Group's appeals of such assignments which the Commissioner wrongly refused to revoke in a series of final decisions. The specific wrongly assigned individual miners and dependents, the date of the Bellaire Group's appeals and the date of the Commissioner's final administrative decisions are set forth in a chart attached hereto and incorporated herein as Exhibit AA.

67. Regulations issued at 20 C.F.R. Section 422.604, provide that once the Commissioner notifies an operator that it has been assigned miners, the operator may, within thirty (30) days, request additional information

concerning the work histories of the miners and the basis for the assignments.

68. The Bellaire Group timely requested information concerning each of the individual miners referenced on Exhibit AA.

69. The Bellaire Group appealed the assignments to it of each of the individual miners referenced on Exhibit AA. Each such appeal was timely made.

70. By several letters dated June 6, 1994; November 21, 1994; November 28, 1994; August 15, 1996; August 16, 1996; June 27, 1997; July 3, 1997; August 11, 1997; and July 8, 1998, the Bellaire Group provided information in support of its request for review of the individual miner assignments. In each such letter, the Bellaire Group showed that the assignments of the individual miners appealed in the particular letter were improper because the Coal Act required the Commissioner to assign the miners to other employers which had a higher assignment priority under the Coal Act with respect to the particular miners in question than did the Bellaire Group. Copies of the appeal letters relating to the individual miners referred to on Exhibit AA are attached as Exhibits D, E, H, J, N, Q, U, W, Y, DD, FF, HH, JJ, LL and MMM.

71. By several letters dated June 28, 1995; July 10, 1995; September 1, 1995; August 19, 1996; January 31, 1997; March 27, 1997; November 25, 1997; February 12, 1998; February 20, 1998; April 1, 1998; May 21, 1998; September 1, 1998; September 2, 1998; September 16, 1998; November 3, 1998; and April 19, 1999, the Commissioner issued final decisions in which he notified the Bellaire Group that he would not revoke the assignment of any of the individual miners referenced in

Exhibit AA. Copies of the final decisions relating to the individual miners referred to on Exhibit AA are attached hereto as Exhibits G, I, K, P, R, V, X, Z, BB, CC, EE, GG, II, KK, MM and NNN.

72. In issuing his final decisions with respect to a number of the Bellaire Group's administrative appeals, the Commissioner has wrongly refused to revoke certain individual assignments, referenced in Exhibit AA, at times reaching inconsistent results in appeals which presented identical factual and legal issues. The specific factual and legal issues inconsistently decided, the dates of the Bellaire Group's appeals on those miners, the dates of the Commissioner's final administrative decisions and the result reached are set forth in a chart attached hereto and incorporated herein as Exhibit NN. The Bellaire Group's appeal letters relating to inconsistent decisions are referenced in paragraph 70 above, except for a September 2, 1994 letter attached hereto as Exhibit 00. The Commissioner's inconsistent final decisions are referenced in paragraph 71, except for a November 27, 1995 decision attached hereto as Exhibit ZZ.

73. The Commissioner's assignments made to the Bellaire Group of the miners and dependents referred to in paragraph 66 and the Commissioner's inconsistent decisions referred to in paragraph 72, were arbitrary, capricious, an abuse of discretion, not in accordance with law, unwarranted by the facts, unsupported by the evidence, plainly erroneous and contained errors apparent from the face of the Commissioner's own records and/or from other information available to the Commissioner.

74. The Commissioner's unlawful assignments of miners and their dependents to the Bellaire Group and

inconsistent final decisions on identical factual and legal issues has caused the Bellaire Group to incur premium obligations and other expenses and harm that it would not have incurred if the Commissioner had properly performed his duties under Section 9706 of the Coal Act.

COUNT VI

75. The Bellaire Group hereby incorporates the averments in paragraphs 1 through 74, above.

76. The Commissioner has unlawfully reassigned miners and dependents among members of the Bellaire group [*sic*] because the liability of Bellaire and other members of the Bellaire Group, including North American and NACCO, is joint and several under the Coal Act, but is exclusively premised upon prior employment relationships which only Bellaire ever had with any retired miners or asset acquisitions to which only Bellaire was a party. Therefore, no member of the Bellaire Group can have any basis of liability different than Bellaire itself has; either all members are equally liable or no member is liable.

77. Whenever an assignment of a miner and/or his dependent was revoked by the Commissioner as to any member of the Bellaire Group, whether Bellaire itself, North American or NACCO, that final decision precluded reassignment of the same miner and/or dependents to another member of the Bellaire Group. Such reassignments constitute "double jeopardy" and undermine the finality of administrative decisions previously rendered by the Commissioner. The specific miners and dependents who have been the subject of assignment, appeal, revocation and subsequent unlawful reassignment within the Bellaire Group and the dates

of their respective appeals, revocations and reassignments are set forth in a chart attached hereto and incorporated herein as Exhibit AAA.

78. By several letters dated June 4, 1994; July 27, 1994; September 23, 1994; and January 9, 1995 various members of the Bellaire Group appealed the assignment of certain miners and dependents. Copies of the appeal letters are attached hereto as Exhibits BBB, DDD, FFF and JJJ.

79. By several letters dated August 15, 1995; September 1, 1995; January 11, 1996; and August 2, 1996, the Commissioner issued final affirmative decisions revoking the assignments referred to on Exhibit AAA. Copies of the affirmative final decisions are attached hereto as Exhibits CCC, EEE, GGG and KKK.

80. Subsequently, the Commissioner reassigned each of the miners referred to on Exhibit AAA to another member of the Bellaire Group, which other member of the Group appealed again by several letters dated August 16, 1996; June 27, 1997; and July 3, 1997. Copies of the second appeal letters are attached hereto as Exhibits Q, U, W, HHH and LLL.

81. By several letters dated March 27, 1997; February 20, 1998; and September 1, 1998, the Commissioner issued further final decisions, some negative and some affirmative, concerning some of these same miners. Copies of the second final decisions are attached hereto as Exhibits R, V, X and III. The second appeal attached hereto as Exhibit LLL remains pending with the Commissioner.

82. The Commissioner's unlawful reassignments among members of the Bellaire Group were arbitrary,

capricious, an abuse of discretion, not in accordance with law, unwarranted by the facts, unsupported by the evidence, plainly erroneous and contained errors apparent from the face of the Commissioner's own records and/or from other information available to the Commissioner.

83. The Commissioner's unlawful reassignments of miners and their dependents among members of the Bellaire Group has caused the Bellaire Group to incur premium obligations and other expenses and harm that it would not have incurred if the Commissioner had properly performed his duties under Section 9706 of the Coal Act.

WHEREFORE, the Bellaire Group respectfully requests that this Court (a) reverse the Commissioner's assignments and final decisions identified in Counts I - VI, above, and revoke or direct the Commissioner to correctly review the assignment to Bellaire of all of the miners (and their dependents) covered by those assignments and final decisions, (b) rescind any original assignment made by the Commissioner on or after October 1, 1993, (c) rescind all reassignment made by the Commissioner among members of the Bellaire Group, and (d) award the Bellaire Group costs of this action, counsel fees, and any other relief which this Court deems just and proper.

Respectfully submitted,

JONES, DAY, REAVIS & POGUE

/s/ By JOHN W. EDWARDS
JOHN W. EDWARDS
Ohio Supreme Court
No. 0010437
Trial Counsel

1900 Huntington Center
Columbus, Ohio 43215
614-469-3939

POLITO & SMOCK, P.C.

/s/ By THOMAS A. SMOCK
THOMAS A. SMOCK
Pa. ID #20203
Of Counsel

/s/ By MICHAEL D. GLASS
MICHAEL D. GLASS
Pa. ID #34431
Of Counsel

Four Gateway Center, Suite 400
444 Liberty Avenue
Pittsburgh, Pennsylvania 15222
(412) 394-3333

Counsel for Bellaire Corporation,
NACCO Industries, Inc. and
The North American Coal
Corporation

Date: June 4, 1999

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

Civil Action No. 99-1035

SHENANGO INCORPORATED, *ET AL.*, PLAINTIFFS

v.

KENNETH S. APFEL, *ET AL.*, DEFENDANTS

DECLARATION OF CARL F. TENNILLE

Carl F. Tennille, being duly sworn, declares and states as follows:

1. I am an employee of the UMWA Combined Benefit Fund (the "Combined Fund"). The Combined Fund is jointly administered with several other ERISA plans, commonly known as the UMWA Health & Retirement Funds (the "Funds"). I am employed as the Funds' Comptroller.

2. I am responsible for the operation and guidance of the Comptroller's Division, which includes, among other things, overall supervision of accounting and financial reporting, collection of statutory premiums and contractual contributions, credit hours compliance, field audit, withdrawal liability and financial analysis for each of the Funds, including the Combined Fund. I am also responsible for ensuring that the Funds have adequate internal accounting controls and that the accounting conforms with GAAP, federal regulations, and Funds' policies.

3. In addition to my other responsibilities, I receive periodic notice from the Social Security Administration ("SSA") of assignments made by SSA pursuant to Section 9706 of the Coal Industry Retiree Health Benefit Act of 1992 (the "Coal Act"). I oversee the process of billing operators to which beneficiaries have been assigned by SSA.

4. After the United States Court of Appeals for the Sixth Circuit issued its decision in *Dixie Fuel v. Apfel*, 171 F.3d 1052 (6th Cir. 1999), SSA provided the Combined Fund with information regarding beneficiaries assigned to operators for the first time after September 30, 1993. Based on the information provided by SSA, the Combined Fund has determined that the decision in *Dixie Fuel* has the potential to affect the assignments of 9,927 beneficiaries, if it were applied on a national basis. The numbers decline from year to year after the first plan year primarily due to mortality.

5. The 9,927 beneficiaries whose assignments could be affected by *Dixie Fuel* are assigned to 247 operators. These 247 operators have been assessed approximately $112 million for these beneficiaries and the Combined Fund's overall collection rate is more than 95%. Therefore, under the *Dixie Fuel* decision, approximately $105 million in premiums paid by these operators would be put in jeopardy. If these premiums are lost, the Combined Fund would be required to bill $48 million to the remaining assigned operators. In addition, the Combined Fund would bill the Abandoned Mine Reclamation Fund ("AML Fund") for the health benefit expenses for these newly unassigned beneficiaries for the years beginning October 1, 1995. If the

Combined Fund were to obtain payments from the AML Fund for these beneficiaries, it would require an estimated $60 and $80 million to cover the periods through September 30, 1999. Additional amounts would be billed to the AML Fund for the current plan year and for all succeeding plan years as long as any beneficiaries remained and as long as there was interest from the AML Fund available for this purpose.

6. The additional amounts that could potentially be billed to the interest earned on the AML Fund as a result of the *Dixie Fuel* decision would virtually eliminate the availability of that interest for other purposes both retroactively and prospectively.

I declare under penalty of perjury that the foregoing is true and correct this 18th day of November, 1999 at Washington, D.C.

/s/ CARL F. TENNILLE
Carl F. Tennille

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO

CIVIL ACTION No. C2-99-532
JUDGE KINNEARY
MAGISTRATE JUDGE KING

BELLAIRE CORPORATION, NACCO INDUSTRIES, INC. AND THE NORTH AMERICAN COAL CORPORATION, PLAINTIFFS

v.

KENNETH S. APFEL, COMMISSIONER OF SOCIAL SECURITY, DEFENDANT

AFFIDAVIT OF DANIEL J. ROLLING

Before me, the undersigned authority, appeared DANIEL J. ROLLING who, being duly sworn, deposed and stated as follows:

1. I am the Property Manager of Bellaire Corporation ("Bellaire") and am authorized by it to make this Affidavit on its behalf. I am also authorized to make this Affidavit on behalf of NACCO Industries, Inc. and The North American Coal Corporation (collectively, with Bellaire, the "Bellaire Group").

2. I have reviewed the Commissioner of Social Security's answer to the Bellaire Group's interrogatory number 19 in the above captioned matter and compared the information contained in that interrogatory answer with the billing statements received from the UMWA Combined Benefit Fund by members of the Bellaire Group for the plan year beginning October 1, 1999 and concluding September 30, 2000. A copy of the Commissioner's pertinent interrogatory answer is attached

hereto as Exhibit A and copies of the current plan year Combined Benefit Fund billing statements directed to any member of the Bellaire Group which include any individual referenced on Exhibit A are attached hereto as Exhibits B and C.

3. Exhibit A identifies a total of 270 miners who were unassigned before October 1, 1993 and later became the subject of an original assignment on or after October 1, 1993 (referred to by the Commissioner in the interrogatory answer as "DIXIE-LIKE MINERS").

4. All 270 of the "DIXIE-LIKE MINERS" identified in Exhibit A are presently assigned to a member of the Bellaire Group. The 270 "DIXIE-LIKE MINERS", as well as any covered dependents, are included among the beneficiaries listed on Exhibits B and C, which show for each such beneficiary the number of plan years for which premiums have been assessed against a member of the Bellaire Group and the amount of such premiums.

5. I prepared two computer printouts detailing the financial impact of the unlawful assignments of the 270 "DIXIE-LIKE MINERS" and their dependents upon members of the Bellaire Group, which printouts are attached hereto as Exhibits D (Bellaire) and Exhibit E (The North American Coal Corporation).

6. The Bellaire Group has been assessed a total of $4,324,312.39 of excessive premiums by the Combined Benefit Fund as a result of the unlawful assignments of "DIXIE-LIKE MINERS" discussed herein, representing a total of 2122 beneficiary-year's worth of unlawful premiums.

7. Of the $4,324,312.39 total assessed against the Bellaire Group as a result of the unlawful assignment

of "DIXIE-LIKE MINERS" and their dependents, $3,841,222.81 was assessed against and paid by the Bellaire Group between February 1, 1993 and September 30, 1999 and $483,090.58 was assessed for the current plan year, which runs from October 1, 1999 to September 30, 2000. The current plan year premium assessment attributable to the 270 "DIXIE-LIKE MINERS" and their dependents is payable in twelve equal installments of $40,257.55, due on the 25th day of each month. The Bellaire Group has paid, as of the date of this Affidavit, $201,287.75 of the current year assessment for the 270 "DIXIE-LIKE MINERS" and their dependents.

8. Unless the 270 unlawful assignments of "DIXIE-LIKE MINERS" and their dependents are revoked, the Bellaire Group will continue to be assessed excessive premiums by the Combined Benefit Fund as long as any of the 270 "DIXIE-LIKE MINERS" and their dependents live.

/s/ DANIEL J. ROLLING
DANIEL J. ROLLING

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO

CIVIL ACTION No. C2-99-532
JUDGE KINNEARY
MAGISTRATE JUDGE KING

BELLAIRE CORPORATION, ET AL., PLAINTIFFS

v.

KENNETH S. APFEL, DEFENDANT

DEFENDANT APFEL'S ANSWER AND OBJECTION TO PLAINTIFF'S INTERROGATORY NO. 19

Interrogatory 19. Please identify each and every miner and beneficiary who has been assigned to the Bellaire Group on or after October 1993 but who was not originally assigned to the Bellaire Group or some other operator on or before September 30, 1993.

Defendant's Answer to Interrogatory 19. Attachment A hereto, consisting of 28 pages, contains information from the Social Security Administration's Coal Act data base showing its current listing of the miners assigned to the Bellaire Group on or after October 1, 1993, but who were not originally assigned to the Bellaire Group or some other operator on or before September 30, 1993.

I declare under penalty of perjury that the foregoing was provided to me by the Social Security Staff, and to the best of my knowledge and belief, is true and correct. Executed on February 15, 2000.

/s/ LAURENCE A. MILLER
LAURENCE A. MILLER, Branch Chief
Disability Litigation Branch
Litigation Staff

Defendant's Objection to Interrogatory 19. The interrogatory as originally posed requested information on both miners and beneficiaries not originally assigned on or before September 30, 1993. The data base used to provide the answer is keyed to miners, not beneficiaries. It is defendant's counsel's understanding that plaintiffs' counsel have subsequently agreed that the interrogatory answer may be limited to identifying the miners. To the extent that understanding is incorrect, and the interrogatory is read to require identification of beneficiaries, defendant objects on the ground that the interrogatory so read would be unduly burdensome and that the value of the further information concerning beneficiaries would be minimal in comparison to that burden.

Respectfully submitted.

DAVID W. OGDEN
Acting Assistant Attorney General
Civil Division

SHARON J. ZEALEY
United States Attorney

ROBERT L. SOLOMON
Assistant United States Attorney

/s/ RICHARD G. LEPLEY
RICHARD G. LEPLEY
BRIAN G. KENNEDY
Department of Justice
Civil Division, Room 1082
901 E Street, N.W.
Washington, D.C. 20530
Telephone: (202) 514-3357

Counsel for Defendant

ATTACHMENT A

02/14/00 BELLAIRE CORP (EIN 34-043129[illegible]) DIXIE-LIKE MINERS

1		ABELE	JOHN	S	
	CURRENT	BELLAIRE CORP			NOTICE SENT 1996/09/16
	PRIOR	NO PRIOR OPERATOR			NOTICE SENT 0000/00/00
2		ARAKI	SANJIRO		
	CURRENT	BELLAIRE CORP			NOTICE SENT 1996/09/16
	PRIOR	NO PRIOR OPERATOR			NOTICE SENT 0000/00/00
3		BAKER	CLARENCE	G	
	CURRENT	BELLAIRE CORP			NOTICE SENT 1996/09/16
	PRIOR	NO PRIOR OPERATOR			NOTICE SENT 0000/00/00
4		BARKER	WESLEY	R	
	CURRENT	BELLAIRE CORP			NOTICE SENT 1996/09/16
	PRIOR	NO PRIOR OPERATOR			NOTICE SENT 0000/00/00
5		BARTHOLOMEW	BLAIR		
	CURRENT	BELLAIRE CORP			NOTICE SENT 1995/09/20
	PRIOR	NO PRIOR OPERATOR			NOTICE SENT 0000/00/00
6		BARTON	JAMES	E	
	CURRENT	BELLAIRE CORP			NOTICE SENT 1993/10/20
	PRIOR	NO PRIOR OPERATOR			NOTICE SENT 0000/00/00
7		BAUER	FRANKLIN	A	
	CURRENT	BELLAIRE CORP			NOTICE SENT 1996/09/16
	PRIOR	NO PRIOR OPERATOR			NOTICE SENT 0000/00/00
8		BELL	ANDREW	C	
	CURRENT	BELLAIRE CORP			NOTICE SENT 1996/09/16
	PRIOR	NO PRIOR OPERATOR			NOTICE SENT 0000/00/00
9		BENDETTI	FRANK	C	
	CURRENT	BELLAIRE CORP			NOTICE SENT 1996/09/16
	PRIOR	NO PRIOR OPERATOR			NOTICE SENT 0000/00/00
10		BERGAMO	CHARLES	W	
	CURRENT	BELLAIRE CORP			NOTICE SENT 1996/09/16
	PRIOR	NO PRIOR OPERATOR			NOTICE SENT 0000/00/00
11		BIERNOT	JOSEPH		
	CURRENT	BELLAIRE CORP			NOTICE SENT 1995/09/20
	PRIOR	NO PRIOR OPERATOR			NOTICE SENT 0000/00/00
12		BLACKHAM	JOHN	R	
	CURRENT	BELLAIRE CORP			NOTICE SENT 1996/09/16
	PRIOR	NO PRIOR OPERATOR			NOTICE SENT 0000/00/00
13		BLACKHAM	LESTER		
	CURRENT	BELLAIRE CORP			NOTICE SENT 1996/09/16
	PRIOR	NO PRIOR OPERATOR			NOTICE SENT 0000/00/00
14.		BONACCI	VITO	A	
	CURRENT	BELLAIRE CORP			NOTICE SENT 1996/09/16
	PRIOR	NO PRIOR OPERATOR			NOTICE SENT 0000/00/00

15

	BROOKINS	PERRY			
CURRENT	BELLAIRE CORP			NOTICE SENT	1995/09/26
PRIOR	NO PRIOR OPERATOR			NOTICE SENT	0000/00/00

16

	BROOKS	JOHN	K		
CURRENT	BELLAIRE CORP			NOTICE SENT	1996/09/16
PRIOR	NO PRIOR OPERATOR			NOTICE SENT	0000/00/00

17

	BROWN	FREELAN	A		
CURRENT	BELLAIRE CORP			NOTICE SENT	1995/09/20
PRIOR	NO PRIOR OPERATOR			NOTICE SENT	0000/00/00

18

	BROWN	ORRIE			
CURRENT	BELLAIRE CORP			NOTICE SENT	1993/10/20
PRIOR	NO PRIOR OPERATOR			NOTICE SENT	0000/00/00

19

	BRUCE	WESLEY	L		
CURRENT	BELLAIRE CORP			NOTICE SENT	1995/09/20
PRIOR	NO PRIOR OPERATOR			NOTICE SENT	0000/00/00

20

	BRUNO	JOHN	A		
CURRENT	BELLAIRE CORP			NOTICE SENT	1996/09/16
PRIOR	NO PRIOR OPERATOR			NOTICE SENT	0000/00/00

21

	BRYAN	THEODORE	C		
CURRENT	BELLAIRE CORP			NOTICE SENT	1996/09/16
PRIOR	NO PRIOR OPERATOR			NOTICE SENT	0000/00/00

22

	BURINDA	LOUIS	J		
CURRENT	BELLAIRE CORP			NOTICE SENT	1996/09/16
PRIOR	NO PRIOR OPERATOR			NOTICE SENT	0000/00/00

23

	BURNSIDE	CLYDE			
CURRENT	BELLAIRE CORP			NOTICE SENT	1996/09/16
PRIOR	NO PRIOR OPERATOR			NOTICE SENT	0000/00/00

24

	BYERS	SOLOMON	S		
CURRENT	BELLAIRE CORP			NOTICE SENT	1995/06/30
PRIOR	NO PRIOR OPERATOR			NOTICE SENT	0000/00/00

25

	CALINGER	JOSEPH			
CURRENT	BELLAIRE CORP			NOTICE SENT	1996/09/16
PRIOR	WHEELING-PITTSBURGH STEEL CORP			NOTICE SENT	1993/10/20

26

	CALINGER	THOMAS			
CURRENT	BELLAIRE CORP			NOTICE SENT	1995/09/20
PRIOR	NORTH AMERICAN COAL CORP			NOTICE SENT	1993/10/20

27

	CALLOR	FIORE			
CURRENT	BELLAIRE CORP			NOTICE SENT	1996/09/16
PRIOR	NO PRIOR OPERATOR			NOTICE SENT	0000/00/00

28		CAMPBELL	ROBERT	C	
	CURRENT	BELLAIRE CORP			NOTICE SENT 1993/10/20
	PRIOR	NO PRIOR OPERATOR			NOTICE SENT 0000/00/00
29		CHA	LAURENCE		
	CURRENT	BELLAIRE CORP			NOTICE SENT 1993/06/30
	PRIOR	NO PRIOR OPERATOR			NOTICE SENT 0000/00/00
30		CHRISTENSEN	VICTOR	M	
	CURRENT	BELLAIRE CORP			NOTICE SENT 1996/09/16
	PRIOR	NO PRIOR OPERATOR			NOTICE SENT 0000/00/00
31		CIPRESSI	ANTONIO		
	CURRENT	BELLAIRE CORP			NOTICE SENT 1996/09/16
	PRIOR	NO PRIOR OPERATOR			NOTICE SENT 0000/00/00
32		CLARK	JAMES		
	CURRENT	BELLAIRE CORP			NOTICE SENT 1993/10/20
	PRIOR	NO PRIOR OPERATOR			NOTICE SENT 0000/00/00
33		CLARK	THOMAS	M	
	CURRENT	BELLAIRE CORP			NOTICE SENT 1996/09/16
	PRIOR	HAWLEY COAL MINING CORP.			NOTICE SENT 0000/00/00
34		COLUMBUS	RALPH	F	
	CURRENT	BELLAIRE CORP			NOTICE SENT 1996/09/16
	PRIOR	NO PRIOR OPERATOR			NOTICE SENT 0000/00/00
35		COTTELLO	MICHAEL		
	CURRENT	BELLAIRE CORP			NOTICE SENT 1996/09/16
	PRIOR	NO PRIOR OPERATOR			NOTICE SENT 0000/00/00
36		CRAIG	JAMES	C	
	CURRENT	BELLAIRE CORP			NOTICE SENT 1996/09/16
	PRIOR	NO PRIOR OPERATOR			NOTICE SENT 0000/00/00
37		CRAZE	THOMAS		
	CURRENT	BELLAIRE CORP			NOTICE SENT 1996/09/16
	PRIOR	NO PRIOR OPERATOR			NOTICE SENT 0000/00/00
38		CROCCO	STANLEY		
	CURRENT	BELLAIRE CORP			NOTICE SENT 1995/09/20
	PRIOR	NO PRIOR OPERATOR			NOTICE SENT 0000/00/00
39		CUSKEY	JOHN		
	CURRENT	BELLAIRE CORP			NOTICE SENT 1996/09/16
	PRIOR	NO PRIOR OPERATOR			NOTICE SENT 0000/00/00
40		DAVIS	CLARENCE		
	CURRENT	BELLAIRE CORP			NOTICE SENT 1993/10/20
	PRIOR	NO PRIOR OPERATOR			NOTICE SENT 0000/00/00
41		DAVIS	FRED	A	
	CURRENT	BELLAIRE CORP			NOTICE SENT 1996/09/16
	PRIOR	NO PRIOR OPERATOR			NOTICE SENT 0000/00/00

42

	DELVECCHIO	FRANK		
CURRENT	BELLAIRE CORP			NOTICE SENT 1995/06/30
PRIOR	NO PRIOR OPERATOR			NOTICE SENT 0000/00/00

43

	DEROSE	DOMINIC		
CURRENT	BELLAIRE CORP			NOTICE SENT 1995/09/20
PRIOR	NORTH AMERICAN COAL CORP			NOTICE SENT 1993/10/20

44

	DIERKES	EARL	E	
CURRENT	BELLAIRE CORP			NOTICE SENT 1996/09/16
PRIOR	NO PRIOR OPERATOR			NOTICE SENT 0000/00/00

45

	DOLES	PAUL	E	
CURRENT	BELLAIRE CORP			NOTICE SENT 1996/09/16
PRIOR	NO PRIOR OPERATOR			NOTICE SENT 0000/00/00

46

	DOMOKOS	MOSES		
CURRENT	BELLAIRE CORP			NOTICE SENT 1996/09/16
PRIOR	NO PRIOR OPERATOR			NOTICE SENT 0000/00/00

47

	DONOHUE	CHRISTOPHE	H	
CURRENT	BELLAIRE CORP			NOTICE SENT 1996/09/16
PRIOR	NO PRIOR OPERATOR			NOTICE SENT 0000/00/00

48

	DRAKE	GEORGE	W	
CURRENT	BELLAIRE CORP			NOTICE SENT 1996/09/16
PRIOR	NO PRIOR OPERATOR			NOTICE SENT 0000/00/00

49

	DRENNAN	WILLIAM	E	
CURRENT	BELLAIRE CORP			NOTICE SENT 1996/09/16
PRIOR	NO PRIOR OPERATOR			NOTICE SENT 0000/00/00

50

	DUNLAP	JESSE	W	
CURRENT	BELLAIRE CORP			NOTICE SENT 1995/09/20
PRIOR	NO PRIOR OPERATOR			NOTICE SENT 0000/00/00

51

	DYER	HARRISON		
CURRENT	BELLAIRE CORP			NOTICE SENT 1995/06/30
PRIOR	NO PRIOR OPERATOR			NOTICE SENT 0000/00/00

52.

	EMBREY	ERNEST	A	
CURRENT	BELLAIRE CORP			NOTICE SENT 1995/09/20
PRIOR	NO PRIOR OPERATOR			NOTICE SENT 0000/00/00

53

	FAZZIO	JOSEPH		
CURRENT	BELLAIRE CORP			NOTICE SENT 1995/09/20
PRIOR	NO PRIOR OPERATOR			NOTICE SENT 0000/00/00

54

	FILIGNO	JOSEPH		
CURRENT	BELLAIRE CORP			NOTICE SENT 1996/09/16
PRIOR	NO PRIOR OPERATOR			NOTICE SENT 0000/00/00

57		FORD	WILLIE	M	
	CURRENT	BELLAIRE CORP			NOTICE SENT 1995/06/30
	PRIOR	NO PRIOR OPERATOR			NOTICE SENT 0000/00/00
58		FULTON	JAMES	J	
	CURRENT	BELLAIRE CORP			NOTICE SENT 1996/09/16
	PRIOR	NO PRIOR OPERATOR			NOTICE SENT 0000/00/00
57		FURBEE	WILLIAM	C	
	CURRENT	BELLAIRE CORP			NOTICE SENT 1995/09/20
	PRIOR	NO PRIOR OPERATOR			NOTICE SENT 0000/00/00
58		GARCIA	ENRIQUE		
	CURRENT	BELLAIRE CORP			NOTICE SENT 1995/09/20
	PRIOR	NO PRIOR OPERATOR			NOTICE SENT 0000/00/00
59		GATCHEL	GEORGE	R	
	CURRENT	BELLAIRE CORP			NOTICE SENT 1993/10/20
	PRIOR	NO PRIOR OPERATOR			NOTICE SENT 0000/00/00
60		GAY	CLEMITH	C	
	CURRENT	BELLAIRE CORP			NOTICE SENT 1993/10/20
	PRIOR	NO PRIOR OPERATOR			NOTICE SENT 0000/00/00
61		GENETIN	ERNESTO		
	CURRENT	BELLAIRE CORP			NOTICE SENT 1995/06/30
	PRIOR	NO PRIOR OPERATOR			NOTICE SENT 0000/00/00
62		GLATZER	HERMAN	C	
	CURRENT	BELLAIRE CORP			NOTICE SENT 1995/09/20
	PRIOR	NO PRIOR OPERATOR			NOTICE SENT 0000/00/00
63		GOODRICH	HOWARD	M	
	CURRENT	BELLAIRE CORP			NOTICE SENT 1996/09/16
	PRIOR	NO PRIOR OPERATOR			NOTICE SENT 0000/00/00
64		GOTTARDI	CHARLES	J	
	CURRENT	BELLAIRE CORP			NOTICE SENT 1996/09/16
	PRIOR	NO PRIOR OPERATOR			NOTICE SENT 0000/00/00
65		GOUDY	ADAM	L	
	CURRENT	BELLAIRE CORP			NOTICE SENT 1995/06/30
	PRIOR	NO PRIOR OPERATOR			NOTICE SENT 0000/00/00
66		GREEN	CHARLES		
	CURRENT	BELLAIRE CORP			NOTICE SENT 1999/09/29
	PRIOR	EASTERN ENTERPRISES			NOTICE SENT 1997/09/22
67		GREGG	MICHAEL	A	
	CURRENT	BELLAIRE CORP			NOTICE SENT 1996/09/16
	PRIOR	NO PRIOR OPERATOR			NOTICE SENT 0000/00/00
68		GRIFFIN	JOSEPH	S	
	CURRENT	BELLAIRE CORP			NOTICE SENT 1995/06/30
	PRIOR	NO PRIOR OPERATOR			NOTICE SENT 0000/00/00

64		HAIRSTON	JOHN	V	
	CURRENT	BELLAIRE CORP			NOTICE SENT 1993/10/20
	PRIOR	NO PRIOR OPERATOR			NOTICE SENT 0000/00/00
70		HALPENNY	HOWARD	B	
	CURRENT	BELLAIRE CORP			NOTICE SENT 1996/09/16
	PRIOR	NO PRIOR OPERATOR			NOTICE SENT 0000/00/00
71		HAMROCK	EDWARD	L	
	CURRENT	BELLAIRE CORP			NOTICE SENT 1996/09/16
	PRIOR	NO PRIOR OPERATOR			NOTICE SENT 0000/00/00
72		HARLAN	RODNEY	E	
	CURRENT	BELLAIRE CORP			NOTICE SENT 1993/10/20
	PRIOR	NO PRIOR OPERATOR			NOTICE SENT 0000/00/00
73		HARRIS	CHALRES	H	
	CURRENT	BELLAIRE CORP			NOTICE SENT 1996/09/16
	PRIOR	NO PRIOR OPERATOR			NOTICE SENT 0000/00/00
74		HATSIS	CHARLES		
	CURRENT	BELLAIRE CORP			NOTICE SENT 1995/09/20
	PRIOR	NO PRIOR OPERATOR			NOTICE SENT 0000/00/00
75		HELSTEN	FRANK	T	
	CURRENT	BELLAIRE CORP			NOTICE SENT 1996/09/16
	PRIOR	NO PRIOR OPERATOR			NOTICE SENT 0000/00/00
76		HENRY	E	L	
	CURRENT	BELLAIRE CORP			NOTICE SENT 1995/09/20
	PRIOR	NO PRIOR OPERATOR			NOTICE SENT 0000/00/00
77		HEPNER	CHARLES	W	
	CURRENT	BELLAIRE CORP			NOTICE SENT 1996/09/16
	PRIOR	NO PRIOR OPERATOR			NOTICE SENT 0000/00/00
78		HERRERA	MOISES		
	CURRENT	BELLAIRE CORP			NOTICE SENT 1995/06/30
	PRIOR	NO PRIOR OPERATOR			NOTICE SENT 0000/00/00
79		HESS	RUSSELL	C	
	CURRENT	BELLAIRE CORP			NOTICE SENT 1996/09/16
	PRIOR	NO PRIOR OPERATOR			NOTICE SENT 0000/00/00
80		HOLMAN	DAVID	L	
	CURRENT	BELLAIRE CORP			NOTICE SENT 1996/09/16
	PRIOR	NO PRIOR OPERATOR			NOTICE SENT 0000/00/00
81		HORNER	JOSEPH		
	CURRENT	BELLAIRE CORP			NOTICE SENT 1995/09/20
	PRIOR	NO PRIOR OPERATOR			NOTICE SENT 0000/00/00

82
HORVATH STEVE
CURRENT BELLAIRE CORP NOTICE SENT 1996/09/16
PRIOR NO PRIOR OPERATOR NOTICE SENT 0000/00/00

83
HORVATH STEVE F
CURRENT BELLAIRE CORP NOTICE SENT 1995/09/20
PRIOR NO PRIOR OPERATOR NOTICE SENT 0000/00/00

84
HOWARD CARL W
CURRENT BELLAIRE CORP NOTICE SENT 1993/10/20
PRIOR NO PRIOR OPERATOR NOTICE SENT 0000/00/00

85
HUDNALL RUSSELL C
CURRENT BELLAIRE CORP NOTICE SENT 1993/10/20
PRIOR NO PRIOR OPERATOR NOTICE SENT 0000/00/00

86
HUNTER DANFORD
CURRENT BELLAIRE CORP NOTICE SENT 1993/10/20
PRIOR NO PRIOR OPERATOR NOTICE SENT 0000/00/00

87
HUNTSMAN ARTHUR L
CURRENT BELLAIRE CORP NOTICE SENT 1996/09/16
PRIOR NO PRIOR OPERATOR NOTICE SENT 0000/00/00

88
INNOCENTI OSCAR P
CURRENT BELLAIRE CORP NOTICE SENT 1993/10/20
PRIOR NO PRIOR OPERATOR NOTICE SENT 0000/00/00

89
JACKSON JAMES A
CURRENT BELLAIRE CORP NOTICE SENT 1996/09/16
PRIOR NO PRIOR OPERATOR NOTICE SENT 0000/00/00

90
JENDRUSIK STANLEY J
CURRENT BELLAIRE CORP NOTICE SENT 1996/09/16
PRIOR NO PRIOR OPERATOR NOTICE SENT 0000/00/00

91
JOHNSON GERNIE W
CURRENT BELLAIRE CORP NOTICE SENT 1996/09/16
PRIOR NO PRIOR OPERATOR NOTICE SENT 0000/00/00

92
JOHNSON LONNIE C
CURRENT BELLAIRE CORP NOTICE SENT 1993/10/20
PRIOR NO PRIOR OPERATOR NOTICE SENT 0000/00/00

93
JOHNSON WILLIAM
CURRENT BELLAIRE CORP NOTICE SENT 1995/09/20
PRIOR NO PRIOR OPERATOR NOTICE SENT 0000/00/00

94
JONES PAUL H
CURRENT BELLAIRE CORP NOTICE SENT 1996/09/16
PRIOR NO PRIOR OPERATOR NOTICE SENT 0000/00/00

95
JOYNSON ARTHUR A
CURRENT BELLAIRE CORP NOTICE SENT 1993/10/20
PRIOR NO PRIOR OPERATOR NOTICE SENT 0000/00/00

96		JUVAN	ANDY		
	CURRENT	BELLAIRE CORP			NOTICE SENT 1996/09/16
	PRIOR	NO PRIOR OPERATOR			NOTICE SENT 0000/00/00
97		KALDOR	FRANK		
	CURRENT	BELLAIRE CORP			NOTICE SENT 1996/09/16
	PRIOR	NO PRIOR OPERATOR			NOTICE SENT 0000/00/00
98		KEENEY	ROBERT	L	
	CURRENT	BELLAIRE CORP			NOTICE SENT 1993/10/20
	PRIOR	NO PRIOR OPERATOR			NOTICE SENT 0000/00/00
99		KELLY	HOWARD		
	CURRENT	BELLAIRE CORP			NOTICE SENT 1996/09/16
	PRIOR	NO PRIOR OPERATOR			NOTICE SENT 0000/00/00
100		KENNEY	NOAH	E	
	CURRENT	BELLAIRE CORP			NOTICE SENT 1996/09/16
	PRIOR	NO PRIOR OPERATOR			NOTICE SENT 0000/00/00
101		KOVACHIC	ANTHONY		
	CURRENT	BELLAIRE CORP			NOTICE SENT 1993/10/20
	PRIOR	NO PRIOR OPERATOR			NOTICE SENT 0000/00/00
102		KUZEMCHAK	METRO		
	CURRENT	BELLAIRE CORP			NOTICE SENT 1996/09/16
	PRIOR	NO PRIOR OPERATOR			NOTICE SENT 0000/00/00
103		LENARZ	K		
	CURRENT	BELLAIRE CORP			NOTICE SENT 1996/09/16
	PRIOR	NO PRIOR OPERATOR			NOTICE SENT 0000/00/00
104		LOCKHART	HAROLD	L	
	CURRENT	BELLAIRE CORP			NOTICE SENT 1996/09/16
	PRIOR	NO PRIOR OPERATOR			NOTICE SENT 0000/00/00
105		LOUDEN	CYRIL	C	
	CURRENT	BELLAIRE CORP			NOTICE SENT 1995/06/30
	PRIOR	NO PRIOR OPERATOR			NOTICE SENT 0000/00/00
106		LYNN	HERMAN	B	
	CURRENT	BELLAIRE CORP			NOTICE SENT 1995/09/20
	PRIOR	NO PRIOR OPERATOR			NOTICE SENT 0000/00/00
107		MACKINAW	PAUL		
	CURRENT	BELLAIRE CORP			NOTICE SENT 1996/09/16
	PRIOR	NO PRIOR OPERATOR			NOTICE SENT 0000/00/00
108		MANUILOW	ANDY		
	CURRENT	BELLAIRE CORP			NOTICE SENT 1995/09/20
	PRIOR	NORTH AMERICAN COAL CORP			NOTICE SENT 1993/10/20

109		MARTIN	THOMAS	W	
	CURRENT	BELLAIRE CORP			NOTICE SENT 1996/09/16
	PRIOR	NO PRIOR OPERATOR			NOTICE SENT 0000/00/00
110		MAY	GEORGE	W	
	CURRENT	BELLAIRE CORP			NOTICE SENT 1995/09/20
	PRIOR	NO PRIOR OPERATOR			NOTICE SENT 0000/00/00
111		MCCORN	C		
	CURRENT	BELLAIRE CORP			NOTICE SENT 1996/09/16
	PRIOR	NO PRIOR OPERATOR			NOTICE SENT 0000/00/00
112		MEADOWS	OFFORD		
	CURRENT	BELLAIRE CORP			NOTICE SENT 1993/10/20
	PRIOR	NO PRIOR OPERATOR			NOTICE SENT 0000/00/00
113		MEDINA	ALBERT	E	
	CURRENT	BELLAIRE CORP			NOTICE SENT 1996/09/16
	PRIOR	NO PRIOR OPERATOR			NOTICE SENT 0000/00/00
114		MERLO	PHILLIP		
	CURRENT	BELLAIRE CORP			NOTICE SENT 1996/09/16
	PRIOR	NO PRIOR OPERATOR			NOTICE SENT 0000/00/00
115		MICHAEL	PAUL		
	CURRENT	BELLAIRE CORP			NOTICE SENT 1998/09/30
	PRIOR	KESSCOALS, INC.			NOTICE SENT 1993/10/20
116		MOKROS	FRANK		
	CURRENT	BELLAIRE CORP			NOTICE SENT 1993/10/20
	PRIOR	NO PRIOR OPERATOR			NOTICE SENT 0000/00/00
117		MONAHAN	GUY	S	
	CURRENT	BELLAIRE CORP			NOTICE SENT 1995/09/20
	PRIOR	NO PRIOR OPERATOR			NOTICE SENT 0000/00/00
118		MONROE	CHESTER	A	
	CURRENT	BELLAIRE CORP			NOTICE SENT 1996/09/16
	PRIOR	NO PRIOR OPERATOR			NOTICE SENT 0000/00/00
119.		MOORE	RICHARD	D	
	CURRENT	BELLAIRE CORP			NOTICE SENT 1995/09/20
	PRIOR	NO PRIOR OPERATOR			NOTICE SENT 0000/00/00
120.		MOORE	STANLEY	W	
	CURRENT	BELLAIRE CORP			NOTICE SENT 1995/09/20
	PRIOR	NO PRIOR OPERATOR			NOTICE SENT 0000/00/00
121		MORTENSEN	HAROLD	G	
	CURRENT	BELLAIRE CORP			NOTICE SENT 1996/09/16
	PRIOR	NO PRIOR OPERATOR			NOTICE SENT 0000/00/00
122		MURRAY	CLYDE	B	
	CURRENT	BELLAIRE CORP			NOTICE SENT 1995/09/20
	PRIOR	NO PRIOR OPERATOR			NOTICE SENT 0000/00/00

123		MUTSKO	JOSEPH		
	CURRENT	BELLAIRE CORP			NOTICE SENT 1995/09/20
	PRIOR	NO PRIOR OPERATOR			NOTICE SENT 0000/00/00
124		NELSON	EDWARD	W	
	CURRENT	BELLAIRE CORP			NOTICE SENT 1996/09/16
	PRIOR	NO PRIOR OPERATOR			NOTICE SENT 0000/00/00
125		NELSON	ELBERN	O	
	CURRENT	BELLAIRE CORP			NOTICE SENT 1996/09/16
	PRIOR	NO PRIOR OPERATOR			NOTICE SENT 0000/00/00
126		NELSON	SAWYER	A	
	CURRENT	BELLAIRE CORP			NOTICE SENT 1996/09/16
	PRIOR	NO PRIOR OPERATOR			NOTICE SENT 0000/00/00
127		NEWHART	JOHN	W	
	CURRENT	BELLAIRE CORP			NOTICE SENT 1995/09/20
	PRIOR	NO PRIOR OPERATOR			NOTICE SENT 0000/00/00
128		NEWKIRK	LOUIS	V	
	CURRENT	BELLAIRE CORP			NOTICE SENT 1993/10/20
	PRIOR	NO PRIOR OPERATOR			NOTICE SENT 0000/00/00
129		OKTABETZ	JAMES	J	
	CURRENT	BELLAIRE CORP			NOTICE SENT 1996/09/16
	PRIOR	NO PRIOR OPERATOR			NOTICE SENT 0000/00/00
130		PALMER	HARRY	C	
	CURRENT	BELLAIRE CORP			NOTICE SENT 1995/06/30
	PRIOR	NO PRIOR OPERATOR			NOTICE SENT 0000/00/00
131		PANDZIK	JOSEPH		
	CURRENT	BELLAIRE CORP			NOTICE SENT 1996/09/16
	PRIOR	NO PRIOR OPERATOR			NOTICE SENT 0000/00/00
132		PARKER	WILLIAM	C	
	CURRENT	BELLAIRE CORP			NOTICE SENT 1996/09/16
	PRIOR	NO PRIOR OPERATOR			NOTICE SENT 0000/00/00
133		PERSINGER	ERNEST		
	CURRENT	BELLAIRE CORP			NOTICE SENT 1996/09/16
	PRIOR	NO PRIOR OPERATOR			NOTICE SENT 0000/00/00
134		PERSINGER	HUGH	E	
	CURRENT	BELLAIRE CORP			NOTICE SENT 1996/09/16
	PRIOR	NO PRIOR OPERATOR			NOTICE SENT 0000/00/00
135		PHILLIS	HARRY	T	
	CURRENT	BELLAIRE CORP			NOTICE SENT 1995/09/20
	PRIOR	NO PRIOR OPERATOR			NOTICE SENT 0000/00/00

136		PLAVKA	PAUL		
	CURRENT	BELLAIRE CORP			NOTICE SENT 1997/09/22
	PRIOR	NO PRIOR OPERATOR			NOTICE SENT 0000/00/00
137		RAPTOSH	NICK		
	CURRENT	BELLAIRE CORP			NOTICE SENT 1993/10/20
	PRIOR	NO PRIOR OPERATOR			NOTICE SENT 0000/00/00
138		RASMUSSEN	DULAN	O	
	CURRENT	BELLAIRE CORP			NOTICE SENT 1996/09/16
	PRIOR	NO PRIOR OPERATOR			NOTICE SENT 0000/00/00
139		RASMUSSEN	LAWRENCE	E	
	CURRENT	BELLAIRE CORP			NOTICE SENT 1996/09/16
	PRIOR	NO PRIOR OPERATOR			NOTICE SENT 0000/00/00
140		RAVENCRAFT	JAMES	A	
	CURRENT	BELLAIRE CORP			NOTICE SENT 1993/10/20
	PRIOR	NO PRIOR OPERATOR			NOTICE SENT 0000/00/00
141		RAY	GEORGE	M	
	CURRENT	BELLAIRE CORP			NOTICE SENT 1996/09/16
	PRIOR	NO PRIOR OPERATOR			NOTICE SENT 0000/00/00
142		REDD	JOHN	D	
	CURRENT	BELLAIRE CORP			NOTICE SENT 1993/10/20
	PRIOR	NO PRIOR OPERATOR			NOTICE SENT 0000/00/00
143		REED	WILLIAM	C	
	CURRENT	BELLAIRE CORP			NOTICE SENT 1996/09/16
	PRIOR	NO PRIOR OPERATOR			NOTICE SENT 0000/00/00
144		REGIS	LARRY		
	CURRENT	BELLAIRE CORP			NOTICE SENT 1995/09/20
	PRIOR	NO PRIOR OPERATOR			NOTICE SENT 0000/00/00
145		REYNOLDS	P	B	
	CURRENT	BELLAIRE CORP			NOTICE SENT 1997/09/22
	PRIOR	NO PRIOR OPERATOR			NOTICE SENT 0000/00/00
146		ROBERTSON	CLEO	G	
	CURRENT	BELLAIRE CORP			NOTICE SENT 1996/09/16
	PRIOR	NO PRIOR OPERATOR			NOTICE SENT 0000/00/00
147		ROBSON	JOHN	W	
	CURRENT	BELLAIRE CORP			NOTICE SENT 1993/10/20
	PRIOR	NO PRIOR OPERATOR			NOTICE SENT 0000/00/00
148		RODKEY	WILLIAM		
	CURRENT	BELLAIRE CORP			NOTICE SENT 1995/09/20
	PRIOR	NO PRIOR OPERATOR			NOTICE SENT 0000/00/00
149		RUMMEL	HARRY		
	CURRENT	BELLAIRE CORP			NOTICE SENT 1996/09/16
	PRIOR	NO PRIOR OPERATOR			NOTICE SENT 0000/00/00

150		SABO	FRANCIS		
	CURRENT	BELLAIRE CORP			NOTICE SENT 1993/10/20
	PRIOR	NO PRIOR OPERATOR			NOTICE SENT 0000/00/00
151		SAFFELL	DELBERT	C	
	CURRENT	BELLAIRE CORP			NOTICE SENT 1996/09/16
	PRIOR	NO PRIOR OPERATOR			NOTICE SENT 0000/00/00
152		SALLAS	JOHN		
	CURRENT	BELLAIRE CORP			NOTICE SENT 1995/09/20
	PRIOR	NO PRIOR OPERATOR			NOTICE SENT 0000/00/00
153		SAYLOR	MURLIE	G	
	CURRENT	BELLAIRE CORP			NOTICE SENT 1999/09/29
	PRIOR	EASTERN ENTERPRISES			NOTICE SENT 1996/09/16
154		SCHOKORA	JOHN	S	
	CURRENT	BELLAIRE CORP			NOTICE SENT 1997/09/22
	PRIOR	BERWIND CORPORATION			NOTICE SENT 1993/10/20
155		SCHULTZ	THOMAS	M	
	CURRENT	BELLAIRE CORP			NOTICE SENT 1993/10/20
	PRIOR	NO PRIOR OPERATOR			NOTICE SENT 0000/00/00
156		SHAMBLIN	OLGA		
	CURRENT	BELLAIRE CORP			NOTICE SENT 1996/09/16
	PRIOR	NO PRIOR OPERATOR			NOTICE SENT 0000/00/00
157		SHIFFLETT	HEZEKIAH	A	
	CURRENT	BELLAIRE CORP			NOTICE SENT 1996/09/16
	PRIOR	NO PRIOR OPERATOR			NOTICE SENT 0000/00/00
158		SHILEY	WILBERT		
	CURRENT	BELLAIRE CORP			NOTICE SENT 1993/10/20
	PRIOR	NO PRIOR OPERATOR			NOTICE SENT 0000/00/00
159		SKUKAN	FRANK		
	CURRENT	BELLAIRE CORP			NOTICE SENT 1996/09/16
	PRIOR	NO PRIOR OPERATOR			NOTICE SENT 0000/00/00
160		SMITH	EDWARD		
	CURRENT	BELLAIRE CORP			NOTICE SENT 1995/09/20
	PRIOR	NO PRIOR OPERATOR			NOTICE SENT 0000/00/00
161		SMITH	HENRY	L	
	CURRENT	BELLAIRE CORP			NOTICE SENT 1996/09/16
	PRIOR	NO PRIOR OPERATOR			NOTICE SENT 0000/00/00
162		SPENSKO	ALFONSI		
	CURRENT	BELLAIRE CORP			NOTICE SENT 1996/09/16
	PRIOR	NO PRIOR OPERATOR			NOTICE SENT 0000/00/00

163		STAIR	CLARENCE	E	
	CURRENT	BELLAIRE CORP			NOTICE SENT 1995/09/20
	PRIOR	NORTH AMERICAN COAL CORP			NOTICE SENT 1993/10/20
164		STATEN	STANLEY		
	CURRENT	BELLAIRE CORP			NOTICE SENT 1993/10/20
	PRIOR	NO PRIOR OPERATOR			NOTICE SENT 0000/00/00
165		STEVENS	STEPHEN	L	
	CURRENT	BELLAIRE CORP			NOTICE SENT 1997/09/22
	PRIOR	NO PRIOR OPERATOR			NOTICE SENT 0000/00/00
166		STEWART	ALVIN	T	
	CURRENT	BELLAIRE CORP			NOTICE SENT 1996/09/16
	PRIOR	NO PRIOR OPERATOR			NOTICE SENT 0000/00/00
167		STEWART	LOWELL	J	
	CURRENT	BELLAIRE CORP			NOTICE SENT 1996/09/16
	PRIOR	PEABODY COAL CO.			NOTICE SENT 1993/10/20
168		STREETS	AMOS	S	
	CURRENT	BELLAIRE CORP			NOTICE SENT 1993/10/20
	PRIOR	NO PRIOR OPERATOR			NOTICE SENT 0000/00/00
169		TAMLLOS	STEVE	G	
	CURRENT	BELLAIRE CORP			NOTICE SENT 1996/09/16
	PRIOR	NO PRIOR OPERATOR			NOTICE SENT 0000/00/00
170		TOMASZEWSKI	WALTER		
	CURRENT	BELLAIRE CORP			NOTICE SENT 1996/09/16
	PRIOR	NO PRIOR OPERATOR			NOTICE SENT 0000/00/00
171		TOMLINSON	JOSEPH	H	
	CURRENT	BELLAIRE CORP			NOTICE SENT 1996/09/16
	PRIOR	NO PRIOR OPERATOR			NOTICE SENT 0000/00/00
172		TRAYLINEK	JOHN	J	
	CURRENT	BELLAIRE CORP			NOTICE SENT 1995/09/20
	PRIOR	NO PRIOR OPERATOR			NOTICE SENT 0000/00/00
173		TRAYLINEK	JOSEPH		
	CURRENT	BELLAIRE CORP			NOTICE SENT 1996/09/16
	PRIOR	NO PRIOR OPERATOR			NOTICE SENT 0000/00/00
174		TRIGG	WILLIAM	M	
	CURRENT	BELLAIRE CORP			NOTICE SENT 1995/09/20
	PRIOR	NO PRIOR OPERATOR			NOTICE SENT 0000/00/00
175		TUCKER	CLARENCE	J	
	CURRENT	BELLAIRE CORP			NOTICE SENT 1995/06/30
	PRIOR	NO PRIOR OPERATOR			NOTICE SENT 0000/00/00
176		TURKOLY	MATTHEW		
	CURRENT	BELLAIRE CORP			NOTICE SENT 1995/06/30
	PRIOR	NO PRIOR OPERATOR			NOTICE SENT 0000/00/00

177

		TURNER	JOE		
CURRENT	BELLAIRE CORP			NOTICE SENT	1996/09/16
PRIOR	NO PRIOR OPERATOR			NOTICE SENT	0000/00/00

178

		VARGO	TONY		
CURRENT	BELLAIRE CORP			NOTICE SENT	1993/10/20
PRIOR	NO PRIOR OPERATOR			NOTICE SENT	0000/00/00

179

		VINCENT	JOHN		
CURRENT	BELLAIRE CORP			NOTICE SENT	1996/09/16
PRIOR	NO PRIOR OPERATOR			NOTICE SENT	0000/00/00

180

		VOLECK	ANTHONY		
CURRENT	BELLAIRE CORP			NOTICE SENT	1996/09/16
PRIOR	NO PRIOR OPERATOR			NOTICE SENT	0000/00/00

181

		VUKSINICK	MARTIN	A		
CURRENT	BELLAIRE CORP				NOTICE SENT	1993/10/20
PRIOR	NO PRIOR OPERATOR				NOTICE SENT	0000/00/00

182

		WALLACE	DONALD	E		
CURRENT	BELLAIRE CORP				NOTICE SENT	1995/09/20
PRIOR	NO PRIOR OPERATOR				NOTICE SENT	0000/00/00

183

		WARBEL	CYPRIAN			
CURRENT	BELLAIRE CORP				NOTICE SENT	1996/09/16
PRIOR	NO PRIOR OPERATOR				NOTICE SENT	0000/00/00

184

		WATKINS	EDWARD	C		
CURRENT	BELLAIRE CORP				NOTICE SENT	1996/09/16
PRIOR	NO PRIOR OPERATOR				NOTICE SENT	0000/00/00

185

		WEIL	RUSSELL	E		
CURRENT	BELLAIRE CORP				NOTICE SENT	1995/09/20
PRIOR	NO PRIOR OPERATOR				NOTICE SENT	0000/00/00

186

		WIDMOR	F	J		
CURRENT	BELLAIRE CORP				NOTICE SENT	1996/09/16
PRIOR	NO PRIOR OPERATOR				NOTICE SENT	0000/00/00

187

		WILLIAMS	HOWARD	J		
CURRENT	BELLAIRE CORP				NOTICE SENT	1996/09/16
PRIOR	NO PRIOR OPERATOR				NOTICE SENT	0000/00/00

188

		WINES	RUSSELL	H		
CURRENT	BELLAIRE CORP				NOTICE SENT	1996/09/16
PRIOR	NO PRIOR OPERATOR				NOTICE SENT	0000/00/00

189

		WOOD	MARTIN	C		
CURRENT	BELLAIRE CORP				NOTICE SENT	1995/06/30
PRIOR	NO PRIOR OPERATOR				NOTICE SENT	0000/00/00

190		WOODRUM	JAMES	H	
	CURRENT	BELLAIRE CORP			NOTICE SENT 1996/09/16
	PRIOR	NO PRIOR OPERATOR			NOTICE SENT 0000/00/00
191		YOUNG	CLARENCE	H	
	CURRENT	BELLAIRE CORP			NOTICE SENT 1996/09/16
	PRIOR	NO PRIOR OPERATOR			NOTICE SENT 0000/00/00
192		ZACCHINI	ERNEST		
	CURRENT	BELLAIRE CORP			NOTICE SENT 1993/10/20
	PRIOR	NO PRIOR OPERATOR			NOTICE SENT 0000/00/00
193		ZATEZALO	NICK		
	CURRENT	BELLAIRE CORP			NOTICE SENT 1996/09/16
	PRIOR	NO PRIOR OPERATOR			NOTICE SENT 0000/00/00
194		ZYCHAL	FRANK	G	
	CURRENT	BELLAIRE CORP			NOTICE SENT 1996/09/16
	PRIOR	NO PRIOR OPERATOR			NOTICE SENT 0000/00/00

TOTAL MINERS: 194

195		ALBUS	HAROLDE	E	
	CURRENT	NORTH AMERICAN COAL CORP			NOTICE SENT 1995/06/30
	PRIOR	NO PRIOR OPERATOR			NOTICE SENT 0000/00/00
196		ANTOSZ	ANDREW		
	CURRENT	NORTH AMERICAN COAL CORP			NOTICE SENT 1996/09/16
	PRIOR	NO PRIOR OPERATOR			NOTICE SENT 0000/00/00
197		BAKER	HARRY		
	CURRENT	NORTH AMERICAN COAL CORP			NOTICE SENT 1996/09/16
	PRIOR	NO PRIOR OPERATOR			NOTICE SENT 0000/00/00
198		BALLOG	EDWARD	G	
	CURRENT	NORTH AMERICAN COAL CORP			NOTICE SENT 1996/09/16
	PRIOR	NO PRIOR OPERATOR			NOTICE SENT 0000/00/00
199		BALSER	MAYWOOD		
	CURRENT	NORTH AMERICAN COAL CORP			NOTICE SENT 1996/09/16
	PRIOR	NO PRIOR OPERATOR			NOTICE SENT 0000/00/00
200		BAUGHMAN	ORVILLE		
	CURRENT	NORTH AMERICAN COAL CORP			NOTICE SENT 1996/09/16
	PRIOR	NO PRIOR OPERATOR			NOTICE SENT 0000/00/00
201		BLOUNT	EUGENE	L	
	CURRENT	NORTH AMERICAN COAL CORP			NOTICE SENT 1996/09/16
	PRIOR	NO PRIOR OPERATOR			NOTICE SENT 0000/00/00
202		BROWN	SAM	S	
	CURRENT	NORTH AMERICAN COAL CORP			NOTICE SENT 1996/09/16
	PRIOR	NO PRIOR OPERATOR			NOTICE SENT 0000/00/00
203		BROWN	WILLIAM	R	
	CURRENT	NORTH AMERICAN COAL CORP			NOTICE SENT 1995/09/20
	PRIOR	NO PRIOR OPERATOR			NOTICE SENT 0000/00/00
204		BURGY	WILLIAM		
	CURRENT	NORTH AMERICAN COAL CORP			NOTICE SENT 1993/10/20
	PRIOR	NO PRIOR OPERATOR			NOTICE SENT 0000/00/00
205		CARLEVATO	S		
	CURRENT	NORTH AMERICAN COAL CORP			NOTICE SENT 1996/09/16
	PRIOR	NO PRIOR OPERATOR			NOTICE SENT 0000/00/00
206		CARMAN	CLARENCE		
	CURRENT	NORTH AMERICAN COAL CORP			NOTICE SENT 1996/09/16
	PRIOR	NO PRIOR OPERATOR			NOTICE SENT 0000/00/00
207		CARR	ALMA	B	
	CURRENT	NORTH AMERICAN COAL CORP			NOTICE SENT 1996/09/16
	PRIOR	NO PRIOR OPERATOR			NOTICE SENT 0000/00/00
208		CIOFANI	ANDREW		
	CURRENT	NORTH AMERICAN COAL CORP			NOTICE SENT 1998/09/30
	PRIOR	WHEELING PITTSBURGH STEEL CORP			NOTICE SENT 1995/06/30

209 COLES WILLIE
CURRENT NORTH AMERICAN COAL CORP NOTICE SENT 1999/09/29
PRIOR CONSOLIDATION COAL COMPANY NOTICE SENT 1996/09/16

210 COOK ALBERT F
CURRENT NORTH AMERICAN COAL CORP NOTICE SENT 1997/09/22
PRIOR PEABODY COAL CO. NOTICE SENT 1996/09/16

211 CROW CLARENCE
CURRENT NORTH AMERICAN COAL CORP NOTICE SENT 1996/09/16
PRIOR NO PRIOR OPERATOR NOTICE SENT 0000/00/00

212 DILLARD JOHN R
CURRENT NORTH AMERICAN COAL CORP NOTICE SENT 1996/09/16
PRIOR NO PRIOR OPERATOR NOTICE SENT 0000/00/00

213 DINARDO JOHN B
CURRENT NORTH AMERICAN COAL CORP NOTICE SENT 1996/09/16
PRIOR NO PRIOR OPERATOR NOTICE SENT 0000/00/00

214 DOTY GEORGE W
CURRENT NORTH AMERICAN COAL CORP NOTICE SENT 1996/09/16
PRIOR NO PRIOR OPERATOR NOTICE SENT 0000/00/00

215 EARY RUBY
CURRENT NORTH AMERICAN COAL CORP NOTICE SENT 1996/09/16
PRIOR NO PRIOR OPERATOR NOTICE SENT 0000/00/00

216 EIKLER WILLIAM H
CURRENT NORTH AMERICAN COAL CORP NOTICE SENT 1996/09/16
PRIOR NO PRIOR OPERATOR NOTICE SENT 0000/00/00

217 ELSWICK JUBE
CURRENT NORTH AMERICAN COAL CORP NOTICE SENT 1996/09/16
PRIOR NO PRIOR OPERATOR NOTICE SENT 0000/00/00

218 FERREL CHARLES E
CURRENT NORTH AMERICAN COAL CORP NOTICE SENT 1996/09/16
PRIOR NO PRIOR OPERATOR NOTICE SENT 0000/00/00

219 FUSCO GUY
CURRENT NORTH AMERICAN COAL CORP NOTICE SENT 1996/09/16
PRIOR NO PRIOR OPERATOR NOTICE SENT 0000/00/00

220 GAGICH PETE
CURRENT NORTH AMERICAN COAL CORP NOTICE SENT 1996/09/16
PRIOR NO PRIOR OPERATOR NOTICE SENT 0000/00/00

221 HANSCN ORVILLE P
CURRENT NORTH AMERICAN COAL CORP NOTICE SENT 1996/09/16
PRIOR NO PRIOR OPERATOR NOTICE SENT 0000/00/00

222 HARPER JAMES F
CURRENT NORTH AMERICAN COAL CORP NOTICE SENT 1996/09/16
PRIOR NO PRIOR OPERATOR NOTICE SENT 0000/00/00

223 HAYCOCK ROBERT M
CURRENT NORTH AMERICAN COAL CORP NOTICE SENT 1996/09/22
PRIOR NO PRIOR OPERATOR NOTICE SENT 0000/00/00

224 HELMS HARRY
CURRENT NORTH AMERICAN COAL CORP NOTICE SENT 1996/09/16
PRIOR NO PRIOR OPERATOR NOTICE SENT 0000/00/00

225 HIVICK FRANK J
CURRENT NORTH AMERICAN COAL CORP NOTICE SENT 1995/06/30
PRIOR NO PRIOR OPERATOR NOTICE SENT 0000/00/00

226 HOWELL P R
CURRENT NORTH AMERICAN COAL CORP NOTICE SENT 1996/09/16
PRIOR NO PRIOR OPERATOR NOTICE SENT 0000/00/00

227 HRANKO JOSEPH
CURRENT NORTH AMERICAN COAL CORP NOTICE SENT 1996/09/16
PRIOR NO PRIOR OPERATOR NOTICE SENT 0000/00/00

228 HUDNALL ROBERT
CURRENT NORTH AMERICAN COAL CORP NOTICE SENT 1996/09/16
PRIOR NO PRIOR OPERATOR NOTICE SENT 0000/00/00

229 HYTHON ANDREW M
CURRENT NORTH AMERICAN COAL CORP NOTICE SENT 1995/09/20
PRIOR NO PRIOR OPERATOR NOTICE SENT 0000/00/00

230 JACKSON JOSEPH
CURRENT NORTH AMERICAN COAL CORP NOTICE SENT 1996/09/16
PRIOR NO PRIOR OPERATOR NOTICE SENT 0000/00/00

231 JENNEWEIN GEORGE D
CURRENT NORTH AMERICAN COAL CORP NOTICE SENT 1996/09/16
PRIOR NO PRIOR OPERATOR NOTICE SENT 0000/00/00

232 KIDD JAMES F
CURRENT NORTH AMERICAN COAL CORP NOTICE SENT 1995/09/20
PRIOR NO PRIOR OPERATOR NOTICE SENT 0000/00/00

233 KIRBY ARTHUR L
CURRENT NORTH AMERICAN COAL CORP NOTICE SENT 1996/09/16
PRIOR NO PRIOR OPERATOR NOTICE SENT 0000/00/00

234 KORAN JOHN H
CURRENT NORTH AMERICAN COAL CORP NOTICE SENT 1995/06/30
PRIOR NO PRIOR OPERATOR NOTICE SENT 0000/00/00

235 KRIECHBAUM ARTHUR W
CURRENT NORTH AMERICAN COAL CORP NOTICE SENT 1996/09/16
PRIOR BELLAIRE CORP NOTICE SENT 1993/10/20

236

	KRNJAICH	AUSTIN		
CURRENT	NORTH AMERICAN COAL CORP			NOTICE SENT 1996/09/16
PRIOR	NO PRIOR OPERATOR			NOTICE SENT 0000/00/00

237

	KULP	GEORGE	L	
CURRENT	NORTH AMERICAN COAL CORP			NOTICE SENT 1995/06/30
PRIOR	NO PRIOR OPERATOR			NOTICE SENT 0000/00/00

238

	LELLI	JOSEPH		
CURRENT	NORTH AMERICAN COAL CORP			NOTICE SENT 1996/09/16
PRIOR	NO PRIOR OPERATOR			NOTICE SENT 0000/00/00

239

	LENDON	WILBUR	F	
CURRENT	NORTH AMERICAN COAL CORP			NOTICE SENT 1995/06/30
PRIOR	NO PRIOR OPERATOR			NOTICE SENT 0000/00/00

240

	LYONS	MIKE	H	
CURRENT	NORTH AMERICAN COAL CORP			NOTICE SENT 1996/09/16
PRIOR	NO PRIOR OPERATOR			NOTICE SENT 0000/00/00

241

	MAYNOR	EUGENE	V	
CURRENT	NORTH AMERICAN COAL CORP			NOTICE SENT 1996/09/16
PRIOR	NO PRIOR OPERATOR			NOTICE SENT 0000/00/00

242

	MINDER	WILLIAM	E	
CURRENT	NORTH AMERICAN COAL CORP			NOTICE SENT 1996/09/16
PRIOR	NO PRIOR OPERATOR			NOTICE SENT 0000/00/00

243

	MONTE	CHARLES	E	
CURRENT	NORTH AMERICAN COAL CORP			NOTICE SENT 1995/06/30
PRIOR	NO PRIOR OPERATOR			NOTICE SENT 0000/00/00

244

	MORRIS	EUGENE		
CURRENT	NORTH AMERICAN COAL CORP			NOTICE SENT 1995/09/20
PRIOR	NO PRIOR OPERATOR			NOTICE SENT 0000/00/00

245

	MULLINS	EMORY	F	
CURRENT	NORTH AMERICAN COAL CORP			NOTICE SENT 1996/09/16
PRIOR	NO PRIOR OPERATOR			NOTICE SENT 0000/00/00

246

	NOLLGE	JULIAN	F	
CURRENT	NORTH AMERICAN COAL CORP			NOTICE SENT 1996/09/16
PRIOR	NO PRIOR OPERATOR			NOTICE SENT 0000/00/00

247

	NOVAK	GUS		
CURRENT	NORTH AMERICAN COAL CORP			NOTICE SENT 1996/09/16
PRIOR	NO PRIOR OPERATOR			NOTICE SENT 0000/00/00

248

	PATTERSON	RALPH	G	
CURRENT	NORTH AMERICAN COAL CORP			NOTICE SENT 1996/09/16
PRIOR	NO PRIOR OPERATOR			NOTICE SENT 0000/00/00

249

	PERSINGER	CLAYTON	E	
CURRENT	NORTH AMERICAN COAL CORP			NOTICE SENT 1996/09/16
PRIOR	NO PRIOR OPERATOR			NOTICE SENT 0000/00/00

250

	POZELL	LARRY		
CURRENT	NORTH AMERICAN COAL CORP			NOTICE SENT 1996/09/16
PRIOR	NO PRIOR OPERATOR			NOTICE SENT 0000/00/00

251

	RIDER	HONZURA		
CURRENT	NORTH AMERICAN COAL CORP			NOTICE SENT 1996/09/16
PRIOR	NO PRIOR OPERATOR			NOTICE SENT 0000/00/00

252

	RYLANT	FERRELL	W	
CURRENT	NORTH AMERICAN COAL CORP			NOTICE SENT 1996/09/30
PRIOR	CONSOLIDATION COAL COMPANY			NOTICE SENT 1996/09/16

253

	SAMPEDRO	JESS		
CURRENT	NORTH AMERICAN COAL CORP			NOTICE SENT 1996/09/16
PRIOR	NO PRIOR OPERATOR			NOTICE SENT 0000/00/00

254

	SANER	HARRY	E	
CURRENT	NORTH AMERICAN COAL CORP			NOTICE SENT 1996/09/16
PRIOR	NO PRIOR OPERATOR			NOTICE SENT 0000/00/00

255

	SCOPEL	CASIMIRO	A	
CURRENT	NORTH AMERICAN COAL CORP			NOTICE SENT 1996/09/16
PRIOR	NO PRIOR OPERATOR			NOTICE SENT 0000/00/00

256

	SCOTT	CHARLES	F	
CURRENT	NORTH AMERICAN COAL CORP			NOTICE SENT 1995/09/20
PRIOR	NO PRIOR OPERATOR			NOTICE SENT 0000/00/00

257

	SEAMAN	GEORGE	S	
CURRENT	NORTH AMERICAN COAL CORP			NOTICE SENT 1996/09/16
PRIOR	NO PRIOR OPERATOR			NOTICE SENT 0000/00/00

258

	SELMON	GEORGE	E	
CURRENT	NORTH AMERICAN COAL CORP			NOTICE SENT 1993/10/20
PRIOR	NO PRIOR OPERATOR			NOTICE SENT 0000/00/00

259

	SELMON	GEORGE	J	
CURRENT	NORTH AMERICAN COAL CORP			NOTICE SENT 1995/06/30
PRIOR	WYOMING POCAHONTAS LAND CO.			NOTICE SENT 1993/10/20

260

	SLATE	WILLIAM	J	
CURRENT	NORTH AMERICAN COAL CORP			NOTICE SENT 1996/09/16
PRIOR	NO PRIOR OPERATOR			NOTICE SENT 0000/00/00

261

	SLATTE	MIKE	T	
CURRENT	NORTH AMERICAN COAL CORP			NOTICE SENT 1995/09/20
PRIOR	NO PRIOR OPERATOR			NOTICE SENT 0000/00/00

262

	SOKA	JULIUS		
CURRENT	NORTH AMERICAN COAL CORP			NOTICE SENT 1995/06/30
PRIOR	NO PRIOR OPERATOR			NOTICE SENT 0000/00/00

BEST AVAILABLE COPY

263 SOVKA WILLIAM L
CURRENT NORTH AMERICAN COAL CORP NOTICE SENT 1996/09/16
PRIOR NO PRIOR OPERATOR NOTICE SENT 0000/00/00

264 STUKEY PAUL M
CURRENT NORTH AMERICAN COAL CORP NOTICE SENT 1995/08/30
PRIOR NO PRIOR OPERATOR NOTICE SENT 0000/00/00

265 TENCH ROBERT L
CURRENT NORTH AMERICAN COAL CORP NOTICE SENT 1999/09/29
PRIOR EASTERN ENTERPRISES NOTICE SENT 1996/09/16

266 THOMPKINS GRANT E
CURRENT NORTH AMERICAN COAL CORP NOTICE SENT 1995/09/20
PRIOR NO PRIOR OPERATOR NOTICE SENT 0000/00/00

267 TOWNSEND LEON F
CURRENT NORTH AMERICAN COAL CORP NOTICE SENT 1996/09/16
PRIOR NO PRIOR OPERATOR NOTICE SENT 0000/00/00

268 TURNER EARLY A
CURRENT NORTH AMERICAN COAL CORP NOTICE SENT 1999/09/29
PRIOR EASTERN ENTERPRISES NOTICE SENT 1996/09/16

269 WOOTEN SALEM R
CURRENT NORTH AMERICAN COAL CORP NOTICE SENT 1997/09/22
PRIOR PEABODY COAL CO. NOTICE SENT 1995/09/20

270 YOST HOWARD W
CURRENT NORTH AMERICAN COAL CORP NOTICE SENT 1996/09/16
PRIOR NO PRIOR OPERATOR NOTICE SENT 0000/00/00

TOTAL MINERS: 76

TOTAL MINERS: 0

Omitted from reproduction in the joint appendix at this point are two further exhibits to the Rolling affidavit, consisting of two letters, each dated October 14, 1999, from the Co-Administrators of the UMWA Combined Benefit Fund to Bellaire Corporation and North American Coal Corporation, each followed by calculations of each corporation's liability to the Combined Fund and a list of miners assigned to each corporation. Those materials may be found in at pages 110-201 of the joint appendix filed in the Sixth Circuit in *Bellaire Corp., et al.* v. *Apfel, et al.*, Nos. 00-4080 and 00-4082.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO

CIVIL ACTION No. C2-99-532
JUDGE KINNEARY
MAGISTRATE JUDGE KING

BELLAIRE CORPORATION, ET AL., PLAINTIFFS

v.

KENNETH S. APFEL, DEFENDANT

DEFENDANT APFEL'S ANSWER

FIRST DEFENSE

To the extent, if any, that plaintiffs seek to recover money damages or any monetary relief of any kind against defendant, the United States, or any officer or agency of the United States, the Court lacks jurisdiction over the subject matter of the action.[1]

SECOND DEFENSE

To the extent, if any, that plaintiffs seek to recover money damages or any monetary relief of any kind against defendant, the United States, or any officer or

---

[1] At the telephonic preliminary pretrial conference of November 10, 1999, plaintiffs' counsel indicated that no monetary relief was sought against the United States or any of its officers or agencies. However, ¶ 11 of the Complaint asserts that jurisdiction exists under 28 U.S.C. § 1346, and that assertion has not been deleted from the Complaint. Thus, defenses against possible monetary claims are included out of an abundance of caution in view of ¶ 11 of the Complaint.

agency of the United States, this action is an unconsented-to suit against the United States and is barred by the sovereign immunity of the United States to such suits.

THIRD DEFENSE

To the extent, if any, that plaintiffs seek recovery or refund of any taxes, this action is barred by plaintiffs' failure to submit a claim for refund to the Secretary of the Treasury.

FOURTH DEFENSE

To the extent, if any, that plaintiffs seek recovery on account of any tort, this action is barred by plaintiffs' failure to submit a claim for a sum certain to the appropriate federal agency.

FIFTH DEFENSE

The Complaint fails to state a claim upon which relief can be granted.[2]

SIXTH DEFENSE

In Count V of the Complaint, plaintiffs challenge assignments on the gound that other employers or entities should have received the assignments, and hence the liabilities associated with such assignments. Complaint ¶ 66. Such other employers or entities are parties who should be joined, if feasible, to this action,

---

[2] With respect to Count IV, defendant recognizes that this Court is bound by the decision in *Dixie Fuel Co.* v. *Apfel*, 171 F.3d 1052 (6th Cir. 1999). The Commissioner respectfully reserves the right to present to this Court his position that *Dixie* was wrongly decided to the extent necessary to preserve that argument for possible reconsideration by the Court of Appeals.

pursuant to Rule 19, Federal Rles of Civil Procedure. The Complaint fails to join those parties to this action.

SEVENTH DEFENSE

1. On January 29, 1993, plaintiff Bellaire initiated a civil action in the United States District Court for the District of Columbia against, *inter alia*, defendant's official predecessor in function, the Secretary of Health and Human Services, challenging liabilities imposed on the Bellaire Group by the Coal Industry Retiree Health Benefit Act of 1992 ("the Coal Act"). *Bellaire Corporation, Inc. et al v. Donna E. Shalala, et al.*, Civil Action Number 93-0183 (D.D.C.) ("*Bellaire I*").

2. The Complaint in *Bellaire I* challenged such liabilities on the grounds that the Coal Act, as applied to Bellaire, violated the Due Process Clause and Takings Clause of the Fifth Amendment to the United States Constitution.

3. On May 7, 1997, *Bellaire I* was dismissed with prejudice on the merits. *See Bellaire Corp v. Shalala*, 995 F. Supp. 125 (D.D.C. 1997).

4. Accordingly, Count III of the complaint is barred by the doctrine of claim preclusion, or res judicata.

EIGHTH DEFENSE

1. On January 29, 1993, plaintiff Bellaire initiated a civil action in the United States District Court for the District of Columbia against, *inter alia*, defendant's official predecessor in function, the Secretary of Health and Human Services, challenging liabilities imposed on the Bellaire Group by the Coal Industry Retiree Health Benefit Act of 1992 ("the Coal Act"). *Bellaire Corpora-*

tion, Inc. et al. v. Donna E. Shalala, et al., Civil Action Number 93-0183 (D.D.C.) ("*Bellaire I*").

2. The Complaint in *Bellaire I* challenged such liabilities on the grounds that the Coal Act, as applied to Bellaire, violated the Due Process Clause and Takings Clause of the Fifth Amendment to the United States Constitution.

3. On May 7, 1997, *Bellaire I* was dismissed with prejudice on the merits. *See Bellaire Corp v. Shalala*, 995 F. Supp. 125 (D.D.C. 1997).

4. Accordingly, issue preclusion (collateral estoppel) bars plaintiffs' arguments that the Coal Act cannot be constitutionally applied to them and bars Count III of the Complaint.

NINTH DEFENSE

1. On January 29, 1993, plaintiff Bellaire initiated a civil action in the United States District Court for the District of Columbia against, *inter alia*, defendant's official predecessor in function, the Secretary of Health and Human Services, challenging liabilities imposed on the Bellaire Group by the Coal Industry Retiree Health Benefit Act of 1992 ("the Coal Act"). *Bellaire Corporation, Inc. et al v. Donna E. Shalala, et al.*, Civil Action Number 93-0183 (D.D.C.).

2. On May 7, 1997, *Bellaire I* was dismissed with prejudice on the merits. *See Bellaire Corp. v. Shalala*, 995 F. Supp. 125 (D.D.C. 1997).

3. In a filing made with its motion for summary judgment in *Bellaire I*, Bellaire represented that the liability Bellaire challenged related to "about 1400 . . . former Bellaire employees and their spouses or dependents." Affidavit of Donald Grischow, Controller and

Treasurer of Bellaire, ¶ 8 (May 13, 1993). In a filing dated May 3, 1995, Bellaire further represented that the number of assigned beneficiaries at issue in the case was still "approximately 1200."

4. Defendant and his agent lack personal knowledge of which assignments were or were not included by Bellaire in its representations that about 1400 or, later, approximately 1200 assignments were at issue in *Bellaire I* and whether or not such assignments at issue in *Bellaire I* include assignments Bellaire seeks to challenge in this case. At this time, such information is known exclusively to Bellaire and its agents and is presumably discoverable from Bellaire.

5. To the extent, if any, that the liabilities plaintiffs seek to challenge in this action are the same liabilities that Bellaire represented to the court in *Bellaire I* were at issue in *Bellaire I*, Counts I, II, III, V, and VI are barred by the doctrine of claim preclusion, or res judicata.

TENTH DEFENSE

1. In Count IV, plaintiffs challenge as having been made in an insufficiently timely fashion assignments that were made after September 30, 1993.

2. The allegedly unlawfully delayed assignments were allegedly made by defendant between October 7 and October 18, 1993, *i.e.*, between 7 days and 18 days later than plaintiffs contend was required.

3. Plaintiffs did not file this challenge to these assignments that were allegedly 7 to 18 days late until June, 1999, and did not serve the Complaint until August, 1999.

4. On information and belief, in the intervening nearly six years, the United Mine Workers of America Combined Benefit Fund ("the Combined Fund") relied upon such assignments and would be prejudiced if such assignments were revoked at this late date.

5. To the extent that revocation of these assignments would necessitate increased transfers of money to the Combined Fund from the Abandoned Mine Reclamation Fund, the Secretary of Interior, who administers the Abandoned Mine Reclamation Fund, and the interests served by the Abandoned Mine Reclamation Fund would be prejudiced if the assignments were revoked at this late date.

6. Accordingly, Count IV of the Complaint is barred by laches.

ELEVENTH DEFENSE

1. In Counts I, II, III, V, and VI, plaintiffs challenge assignments that were made to them based on final decisions made on different dates, from as early as June 28, 1995, to as late as April 19, 1999. Complaint ¶¶ 28, 41, 71, 81.

2. Plaintiffs did not file this action challenging those assignments until June, 1999, and did not serve the Complaint until August, 1999.

3. While some delay in challenging the first assignment decisions may have been motivated by a desire to avoid seriatim litigation, undue multiplicity of litigation could also have been avoided by a prompter challenge to the early final decisions combined with periodic supplementation of the pleadings.

4. In Count V, plaintiffs' claims depend on the argument that some other entity should have been assigned

the liability instead because it had a higher assignment priority. While, in Counts I, II, III, and VI, plaintiffs do not argue that another entity had a higher assignment priority, if the assignments to plaintiffs are voided, in some cases there may be other entities who would have been assigned the liability were it not for the Commissioner's determination that the assignments were properly made to plaintiffs. Thus, under Count V it is certain, and under Counts I, II, III, and VI it is possible, that a voiding of the assignments to plaintiffs on a timely basis would have resulted in another entity being liable. Those liabilities are for the period beginning October 1, 1993 until the death of the beneficiary or beneficiaries with respect to each such assignment.

5. Plaintiffs' delay in challenging their assignments may make it infeasible to impose responsibility for those assignments upon other entities to whom such responsibility could have been reassigned in the event of a more timely challenge. To that extent, Count I, II, III, V, and VI are barred by laches.

TWELFTH DEFENSE

Plaintiffs have failed to exhaust their administrative remedies with respect to Count IV.[3]

---

[3] Defendant recognizes that this Court is bound by the decision in *Dixie Fuel Co. v. Apfel*, 171 F.3d 1052 (6th Cir. 1999). The Commissioner respectfully reserves the right to present to this Court his position that *Dixie* was wrongly decided to the extent necessary to preserve that argument for possible reconsideration by the Court of Appeals.

THIRTEENTH DEFENSE

Answering the specific numbered paragraphs of plaintiffs' amended complaint using paragraph numbering corresponding to the paragraph numbers of the complaint, defendant states:

1. The first sentence contains plaintiffs' characterization of their action to which no response is required; if a response is required, said allegations are denied. The second sentence is admitted. The third sentence is denied. The fourth sentence is denied, except that it is admitted that NACCO and North American are related persons to Bellaire within the meaning of the Coal Act. Defendant is without sufficient knowledge or information to form a belief as to the truth or falsity of the allegations of the fifth sentence, except that it is admitted that any appeals by any members of the Bellaire Group were prepared on Bellaire Corporation letterheads. The sixth sentence does not contain averments of fact to which an answer is required, but does contain plaintiff's adoption of "Bellaire Group" as a shorthand reference to all three plaintiffs; this Answer will also use "Bellaire Group" synonymously with "plaintiffs" or "the plaintiff companies," unless specific reference is made to one of the individual companies.

2. The first sentence contains plaintiffs' characterization of their action to which no response is required; if a response is required, said allegations are denied. The second sentence is denied.

3. The first sentence contains plaintiffs' characterization of their action to which no response is required; if a response is required, said allegations are denied. The second sentence contains plaintiffs' characterization of the Supreme Court's decision in *Eastern Enterprises v. Apfel*, 524 U.S. 498 (1998), which decision speaks for itself. The third sentence is admitted. The fourth sentence is denied, except that it is admitted that ICC signed a Coal Wage Agreement in 1966, that during the pendency of the agreement the Bellaire Group bought ICC's business, that Bellaire thereafter signed, *inter alia*, the 1974, 1978, 1981, and 1984 NBCWAs, that Cambria signed a Coal Wage Agreement in 1954, that during the pendency of the agreement the Belllaire Group bought Cambria's business, and that Bellaire thereafter signed, *inter alia*, the 1974, 1978, 1981, and 1984 NBCWAs. The fifth sentence is denied. The sixth sentence is denied.

4. The first sentence contains plaintiffs' characterization of their action to which no response is required; if a response is required, said allegations are denied. The second sentence and the citation following that sentence contain plaintiffs' characterization of the Coal Act, the provisions of which speak for themselves. The third sentence is denied.

5. The first sentence contains plaintiffs' characterization of their action to which no response is required; if a response is required, said allegations are denied. The second and third sentences are denied.

6. The first sentence contains plaintiffs' characterization of their action to which no response is required; if a response is required, said allegations are denied. The remaining allegations of the paragraph are denied, except it is admitted that the obligations of the companies of the Bellaire Group under the Coal Act are joint and several obligations.

7. Defendant is without sufficient knowledge or information to form a belief as to the truth or falsity of the allegations of paragraph 7 of the Complaint, except it is admitted that plaintiff Bellaire has reported that its principal place of business is at 14785 Preston Road, Suite 1100, Dallas, Texas 75240-7891.

8. Defendant is without sufficient knowledge or information to form a belief as to the truth or falsity of the allegations of paragraph 8 of the Complaint, except it is admitted that plaintiff NACCO has reported that its principal place of business is at 5875 Landerbrook, Suite 300, Mayfield Heights, Ohio 44124.

9. Defendant is without sufficient knowledge or information to form a belief as to the truth or falsity of the allegations of paragraph 9 of the Complaint, except it is admitted that plaintiff North American has reported that its principal place of business is at 14785 Preston Road, Suite 1100, Dallas, Texas 75240-7891.

10. The first and third sentences are admitted. The second sentence is admitted, and it is further averred that the Commissioner also maintains a principal office in Washington, D.C.

11. Denied, except it is admitted that, if plaintiffs do not seek any monetary relief against the defendant, the United States, or any officer or agency of the United States, jurisdiction over this action arises under 28 U.S.C. § 1331.

12. Admitted.

13. Paragraph 13 of the Complaint contains plaintiffs' characterization of the Coal Act, the provisions of which speak for themselves.

14. Paragraph 14 of the Complaint contains plaintiffs' characterization of the Coal Act, the provisions of which speak for themselves.

15. Paragraph 15 of the Complaint contains plaintiffs' characterization of the Coal Act, the provisions of which speak for themselves.

16. Paragraph 16 of the Complaint contains plaintiffs' characterization of the Coal Act, the provisions of which speak for themselves.

17. Paragraph 17 of the Complaint contains plaintiffs' characterization of the Coal Act, the provisions of which speak for themselves.

18. Defendant hereby incorporates by reference his answers and other responses to paragraphs 1-17 of the Complaint.

19. The first sentence is admitted. The second and third sentences refer to the cited Guidelines, which Guidelines speak for themselves.

20. Admitted.

21. Denied, except it is admitted that the Commissioner assigned ICC miners and their dependents to the Bellaire Group and that he determined that ICC had employed the miners under a Coal Wage Agreement and would have received the assignments had it still been in business, that no related persons of ICC other than the Bellaire Group were still in business, and that a member of the Bellaire Group had acquired ICC's coal mining business in 1968.

22. Defendant lacks knowledge or information sufficient to form a belief as to the truth of the averments in the first sentence. The second sentence is denied.

23. Defendant lacks knowledge or information sufficient to form a belief as to the truth of the averments in the first sentence, except to admit that in 1968 a member of the Bellaire Group purchased ICC's coal mining business. The remainder of the paragraph contains plaintiffs' characterization of documents they supplied to the Commissioner in connection with their appeals, and said documents speak for themselves.

24. Paragraph 24 of the Complaint contains plaintiffs' characterization of regulations, the provisions of which speaks for themselves.

25. Admitted.

26. Denied, except: 1) that it is admitted that plaintiffs timely appealed the assignments to them of each ICC miner except for Martin A. Vuksinick; 2) that it is admitted that plaintiffs filed an untimely appeal of the assignments of Martin A. Vuksinick; 3) that defendant lacks knowledge or information sufficient to form a belief as to the truth or falsity of the allegations that plaintiffs believed that Mr. Vuksinick was deceased and that such belief was reasonable; and 4) that defendants lack knowledge or information sufficient to form a belief as to the date on which plaintiffs learned that Mr. Vuksinick was not deceased.

27. The first and third sentences are admitted. The second sentence is denied.

28. Admitted.

29. Denied.

30. Denied.

31. Defendant hereby incorporates by reference his answers and other responses to paragraphs 1-30 of the Complaint.

32. The first sentence is admitted. The second and third sentences refer to the cited Guidelines, which Guidelines speak for themselves.

33. Admitted.

34. Denied, except it is admitted that the Commissioner assigned the Cambria miners and their dependents to the Bellaire Group and that he determined that Cambria had employed the miners under a Coal Wage Agreement and would have received the assignments had it still been in business, that no related persons of Cambria other than the Bellaire Group were still in business, and that a member of the Bellaire Group had acquired Cambria's coal mining business in 1954.

35. Defendant lacks knowledge or information sufficient to form a belief in the truth or falsity of the allegations of the first sentence. The second sentence is denied.

36. Defendant lacks knowledge or information sufficient to form a belief as to the truth of the averments in the first sentence, except to admit that in 1954 a member of the Bellaire Group purchased Cambria's coal mining business. The remainder of the paragraph contains plaintiffs' characterization of documents they supplied to the Commissioner in connection with their appeals, and said documents speak for themselves.

37. Paragraph 37 of the Complaint contains plaintiffs' characterization of regulations, the provisions of which speak for themselves.

38. Admitted.

39. Admitted.

40. The first and third sentences are admitted. The second sentence is denied.

41. Admitted.

42. Denied.

43. Denied.

44. Defendant hereby incorporates by reference his answers and other responses to paragraphs 1-43 of the Complaint.

45. Paragraph 45 of the Complaint contains plaintiffs' characterization of the Supreme Court's decision in *Eastern Enterprises v. Apfel*, 524 U.S. 498 (1998), which decision speaks for itself.

46. Admitted.

47. Denied, except that it is admitted that ICC signed a Coal Wage Agreement in 1966, that during the pendency of the agreement the Bellaire Group bought ICC's business, and that Bellaire thereafter signed, *inter alia*, the 1974, 1978, 1981, and 1984 NBCWAs.

48. Denied, except that it is admitted that Cambria signed a Coal Wage Agreement in 1954, that during the pendency of the agreement the Bellaire Group bought Cambria's business, and that Bellaire thereafter signed, *inter alia*, the 1974, 1978, 1981, and 1984 NBCWAs.

49. This paragraph contains plaintiffs' characterization of the Coal Act and of defendant's decisions construing the Coal Act, the provisions of which speak for themselves.

50. Paragraph 50 of the Complaint contains conclusions of law based on an incomplete contra-factual hypothetical rather than averments of fact to which an answer is required. To the extent an answer is

required, the Commissioner denies that he would have voided the assignments to ICC had ICC remained in business and, like its actual successor (Bellaire), signed the 1974, 1978, 1981, and 1984 NBCWAs.

51. Paragraph 51 of the Complaint contains conclusions of law based on an incomplete contra-factual hypothetical rather than averments of fact to which an answer is required. To the extent an answer is required, the Commissioner denies that he would have voided the assignments to Cambria had Cambria remained in business and, like its actual successor (Bellaire), signed the 1974, 1978, 1981, and 1984 NBCWAs.

52. Paragraph 52 of the Complaint is denied, except that it is admitted that the Commissioner did not void the assignments of the ICC and Cambria miners (and their dependents) to the Bellaire Group.

53. Denied.

54. Denied.

55. Defendant hereby incorporates by reference his answers and other responses to paragraphs 1-54 of the Complaint.

56. This paragraph contains plaintiffs' characterization of the Coal Act, the provisions of which speak for themselves.

57. This paragraph contains plaintiffs' characterization of the Coal Act, the provisions of which speak for themselves.

58. This paragraph contains plaintiffs' characterization of the Coal Act, the provisions of which speak for themselves.

59. Admitted.

60. Denied, except it is admitted that the Commissioner made some original assignments to the Bellaire Group after September 30, 1993, and that assignment letters making such assignments are attached as exhibits to the Complaint.

61. Defendant lacks knowledge or information sufficient to form a belief as to the truth or falsity of the averments of this paragraph, except it is admitted that SSA discloses whether an assignment is an original assignment or a reassignment only upon request.

62. Paragraphs 62 of the Complaint contains conclusions of law and not averments of fact to which an answer is required, but insofar as an answer may be deemed to be required, paragraph 62 of the Complaint is denied.

63. Denied.

64. Denied.

65. Defendant hereby incorporates by reference his answers and other responses to paragraph 1-64 of the Complaint.

66. The first two sentences are admitted. The third sentence contains plaintiffs' characterization of Count V of the Complaint, to which no response is required; if a response is required, the allegations are denied. The fourth sentence is denied, except that it is admitted that the specific assigned individual miners and dependents that Bellaire contends were wrongly assigned, the date of Bellaire's appeals, and the date of the Commissioner's final administrative decisions are set forth in a chart attached as Exhibit AA of the Complaint.

67. This paragraph contains plaintiffs' characterization of regulations, the provisions of which speak for themselves.

68. Admitted.

69. Admitted.

70. The first and third sentences are admitted. The second sentence is denied.

71. Admitted.

72. The first sentence contains conclusions of law and not averments of fact to which an answer is required, but insofar as an answer may be deemed to be required, the allegations are denied. The second sentence's averment that Bellaire's listing of, and contentions concerning, allegedly inconsistent agency decisions is set out in Exhibit NN to the Complaint is admitted; the remainder of the second sentence contains conclusions of law and not averments of fact to which an answer is required, but insofar as an answer may be required, the allegations are denied. The third sentence is admitted. The fourth sentence's averment that the allegedly inconsistent decisions are referenced in paragraph 71 and, in one case, attached as Exhibit ZZ are admitted; the remainder of the fourth sentence contains conclusions of law and not averments of fact to which an answer is required, but insofar as an answer may be required, the allegations are denied.

73. This paragraph contains conclusions of law and not averments of fact to which an answer is required; but insofar as an answer may be required, the allegations are denied.

74. Denied.

75. Defendant hereby incorporates by reference his answers and other responses to paragraphs 1-74 of the Complaint.

76. Denied, except it is admitted that the liability of the Bellaire Group is joint and several and that in some instances the Commissioner has reassigned liability among members of the Bellaire Group.

77. Denied, except that it is admitted that Exhibit AA to the Complaint contains a listing of miners that were reassigned within the Bellaire Group.

78. Admitted.

79. Admitted.

80. Admitted.

81. Admitted.

82. Denied.

83. Denied.

The remainder of plaintiffs' Complaint contains their prayer for relief, to which no response is required, but to the extent that a response is required, defendants deny that plaintiffs are entitled to the relief requested or to any relief whatsoever.

WHEREFORE, the Court should dismiss this action with prejudice or enter judgment for defendant, award defendant his costs, and enter any other relief that this Court deems just and proper.

Respectfully submitted,

DAVID W. OGDEN
Acting Assistant Attorney General
Civil Division

SHARON J. ZEALEY
United States Attorney

ROBERT L. SOLOMON
Assistant United States Attorney

/s/ BRIAN G. KENNEDY
RICHARD G. LEPLEY
BRIAN G. KENNEDY
Department of Justice
Civil Division, Room 1082
901 E Street, N.W.
Washington, D.C. 20530
Telephone: (202) 514-3357

Counsel for Defendant.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO

CIVIL ACTION No. C2-99-532
JUDGE KINNEARY
MAGISTRATE JUDGE KING

BELLAIRE CORPORATION, NACCO INDUSTRIES, INC., AND THE NORTH AMERICAN COAL CORPORATION,
PLAINTIFFS

v.

KENNETH S. APFEL, COMMISSIONER OF SOCIAL SECURITY, DEFENDANT

AFFIDAVIT OF MICHAEL D. GLASS

Before me, the undersigned authority, appeared MICHAEL D. GLASS who, being duly sworn, deposed and stated as follows:

1. I am counsel for Bellaire Corporation ("Bellaire") and authorized by it to make this Affidavit on its behalf. I am also authorized to make this Affidavit on behalf of NAACO Industries, Inc. and The North American Coal Corporation (collectively, with Bellaire, the "Bellaire Group").

2. I have reviewed the Commissioner of Social Security's answer to the Bellaire Group's interrogatory number 19 in the above captioned matter and compared the information contained in that interrogatory answer with Exhibits C and QQ to the Complaint, as well as the billing statements received from the UMWA Combined

Benefit Fund by members of the Bellaire Group for the plan year beginning October 1, 1999 and concluding September 30, 2000. A copy of the Commissioner's pertinent interrogatory answer is attached as Exhibit 1-A to the Affidavit of Daniel J. Rolling (the "Rolling Affidavit"), and copies of the current plan year Combined Benefit Fund billing statements directed to any member of the Bellaire Group which include any individual referenced on Exhibit 1-A to the Rolling Affidavit are attached thereto as Exhibits 1-B and 1-C.

3. In addition to the 270 "DIXIE-LIKE MINERS" and their dependents listed by the Commissioner in Exhibit 1-A to the Rolling Affidavit, the Commissioner has also admitted in his Answer to the Complaint assigning a further two "DIXIE-LIKE MINERS" and their dependents to members of the Bellaire Group. These "DIXIE-LIKE MINERS" and their dependents are Wallace Gordon, SSN [redacted] and Leland A. Thomas, SSN [redacted] and his spouse, Clara Thomas. See Complaint, paragraph 60 and Exhibits C and QQ thereto and the Commissioner's Answer, paragraph 60.

4. Paragraph 60 of the Complaint stated as follows:

> The Bellaire Group avers on the basis of information and belief that the Commissioner made original assignments to the Bellaire Group after September 30, 1993 and in violation of the Coal Act's express terms on a number of occasions. The specific miners and dependents presently believed to have been the subject of original assignments after September 30, 1993 and the dates of their respective assignments to the Bellaire Group are set forth in a chart attached hereto and incorporated herein as

Exhibit C. The Commissioner's presently known unlawful original assignments to the Bellaire Group referrred to in this paragraph were made in several letters dated after September 30, 1993. Copies of these assignment letters referred to on Exhibit C are attached hereto as Exhibits PP through YY.

5. Paragraph 60 of the Commissioner's Answer stated as follows:

> Denied, *except it is admitted that the Commissioner made some original assignments to the Bellaire Group after September 30, 1993, and that assignment letters making such assignments are attached as exhibits to the Complaint.* [Emphasis added.]

6. Exhibit QQ to the Complaint is the assignment letter relating to the "DIXIE-LIKE MINERS" and their dependents mentioned in paragraph 3 above and the Commissioner has judicially admitted that the miners and dependents referenced therein were original assignments made after September 30, 1993.

7. The unlawful assignment by the Commissioner of these two additional "DIXIE-LIKE MINERS" and their dependents to members of the Bellaire Group has resulted in the Bellaire Group being assessed by the Combined Benefit Fund a total of 14 additional beneficiary-years' worth of excessive premiums under Section 9704 of the Coal Act. See attachment to the Rolling Affidavit, Exhibit 1-C, specific page identified by Bellaire Group production number BG00173.

8. By reason of the unlawful assignment of the two additional "DIXIE-LIKE MINERS" and their dependents admitted by the Commissioner in his Answer, paragraph 60, but not included among the 270 "DIXIE-LIKE MINERS" and their dependents admitted to by the Commissioner in Exhibit 1-A to the Rolling Affidavit, the Bellaire Group has already been assessed a further total of $27,450.09[1] of Combined Benefit Fund excessive premiums. See Rolling Affidavit, Exhibit 1-C thereto, specific page identified by Bellaire Group production number BG0173 and Exhibit 2-A hereto, setting forth annual per beneficiary Combined Benefit Fund premiums applicable for each plan year.

9. The Commissioner has refused to accept, obey or apply the holding of the Sixth Circuit that the Coal Act "requires that the SSA make all assignments of beneficiaries before October 1, 1993" and that the Coal Act "does not permit the SSA to make such assignments after that date." *Dixie Fuel*, 171 F.3d at 1064.

10. Instead, the Commissioner impermissably has imposed conditions upon the Sixth Circuit's Dixie Fuel holding which render it essentially meaningless. In a March 20, 2000 final administrative decision rendered on one of the Bellaire Group's administrative appeals relating to a "DIXIE-LIKE MINER" and is dependent, the Commissioner articulated the following general policy:

---

[1] This figure includes $2.503.06 for the current plan year. As indicated in Exhibit 1, Rolling Affidavit, paragraphs 6 and 7 with respect to the larger sum referenced in paragraph 7 above, this $2,503.06 is payable in twelve equal installments due on the 25th of each month of the plan year, five such installments having already been paid.

As a result of the decision in *Dixie Fuel Company* v. *Apfel*, SSA will draw an assignment made to a signatory operator (or related person) if:

- the assignment decision was made on, or after, July 7, 1999; AND
- the miner was initially assigned to a signatory operator (or related person) on, or after October 1, 1993 AND
- the currently assigned operator (or related person) resides in the Sixth Circuit.

We have determined that the assignment decision for miner Elmer H. Hamilton was not made on, on after July 7, 1999, and that you do not reside in the Sixth Circuit. Therefore, you are still responsible for the assignments previously made to the company under the provisions of the Coal Act.

See Exhibit 2-B hereto.

11. The first condition imposed by the Commissioner upon the Sixth Circuit's Dixie Fuel decision upholds all of the Commissoiner's unlawful assignments made after September 30, 1993 and before July 7, 1999. This covers almost all of the Commissioner's unlawful assignments. For example, of the 270 "DIXIE-LIKE MINERS" the Commissioner admitted assigning to members of the Bellaier Group, only six were assigned after July 7, 1999 and would be rescinded under the Commissioner's newly announced policy, provided that the Commissioner's other conditions were met. See Exhibit 1-A to the Rolling Affidavit.

12. Further, the Commissioner simply is wrong in asserting that the Bellaire Group generally and Bellaire in particular do not "reside" in the Sixth Circuit. See Complaint, paragraph 1, 7, 8 and 9. In that regard,

a. The Commissioner had made the majority of the contested assignments of "DIXIE-LIKE MINERS" and their dependents to Bellaire under EIN 34-0431290 and a lesser number to North American under EIN 34-1554846. While no "DIXIE-LIKE MINERS" or their dependents have been assigned to NACCO, it is a related person to both Bellaire and North American. Of the three, only Bellaire is a signatory operator as defined in the Coal Act. NACCO and North American are merely related persons, within the meaning of the Coal Act, to Bellaire. Neither NACCO or North American ever employed any miner assignale under the Coal Act. Bellaire has prepared and filed all the administrative appeals referenced herein, regardless of which company received the assignment from the Commissioner.

b. Plaintiff Bellaire is a corporation organized under the laws of the state of Ohio with its principle place of business located at Signature Place II, 14785 Preston Road, Suite 1100, Dallas, Texas 75240-7891, but maintains an office at 155 Highway 7, Powhatan Point, Ohio 43942. Bellaire formerly operated bituminous coal mines and associated facilities located in Belmont County, Ohio, and in other locations. Bellaire still owns substantial coal reserves in Ohio. Bellaire administers those coal reserves, as well

as numerous worker's compensation and black lung claims from the Powhatan Point office.

c. Plaintiff NACCO is a corporation organized under the laws of the state of Delaware, with its principal place of business located at 5875 Landerbrook, Suite 300, Mayfield Heights, Ohio 44124. NACCO is the parent corporation of Bellaire.

d. Plaintiff North American is a corporation organized under the laws of the state of Delaware, with its principal place of business located at Signature Place II, 14785 Preston Road, Suite 1100, Dallas, Texas 75240-7891, but maintains an office at 155 Highway 7, Powhatan Point, Ohio 43942. North American is a subsidiary of NACCO.

13. Unless the 2 additional unlawful assignments of "DIXIE-LIKE MINERS" and their dependents referenced herein are revoked, the Bellaire Group will continue to be assessed excessive premiums by the Combined Benefit Fund as long as any of the 2 "DIXIE-LIKE MINERS" and their dependents live.

14. There is no just reason for delay in entering a final judgment on Count IV of the Complaint. In fact, entry of final judgment on Count IV will simplify the remainder of the case, since many of the assignments of benefciaries challenged in Count IV of the Complaint also are challenged in one or more other Counts for reasons wholly unrelated to Count IV. See, for example, the table I have prepared which is attached as Exhibit 2-C hereto. Exhibit 2-C lists assignments of beneficiaries subject to Count IV of the Complaint, but

also challenged under other Counts. The assignment of each beneficiary listed on Exhibit 2-C would be eliminated from further challenge under the other Counts of the Complaint upon entry of final judgment on Count IV.

/s/ MICHAEL D. GLASS
Michael D. Glass

Social Security Administration
Important Information

Southeastern Program Service Center
P.O. Box 10728
Birmingham, AL 35202

EIN: 34-0431290

George W. Bartlett, Jr.
Bellaire Corporation
14785 Preston Road, Suite 1100
Dallas, TX 75240-7891

This is in response to your letter dated July 6, 1999 concerning miners assigned to you under the Coal Industry Retiree Health Benefit Act of 1992 (Coal Act).

In your July 6, 1999 letter, you requested that we withdraw the assignment of miner Elmer H. Hamilton (redacted) and his dependent, Georgette Hamilton (redacted), who were initially assigned to you on, or after, October 1, 1993. You also cited the Sixth Circuit *Dixie Fuel Company* v. *Apfel* decision as the basis for your request.

We previously advised you that the Social Security Administration (SSA) was reviewing this decision to determine its affect on other companies that received assignments under the Coal Act. We have now completed our review.

As a result of the decision in Dixie Fuel Company v. Apfel, SSA will withdraw an assignment made to a signatory operator (or related person) if:

- the assignment decision was made on, or after, July 7, 1999; and
- the miner was intially assigned to a signatory operator (or related person) on, or after October 1, 1993; and
- the currently assigned operator (or related person) resides in the Sixth Circuit.

We have determined that the assignment decision for miner Elmer H. Hamilton was not made on, or after, July 7, 1999, and that you do not reside in the Sixth Circuit. Therefore, you are still responsible for the assignments previously made to the company under the provisions of the Coal Act.

However, as stated in our letter to you dated February 4, 2000, SSA will review the assignment of this matter in accordance with your previous request, the evidence you presented with your July 6, 1999 letter, and any evidence you may present prior to the expiration of the 180 day extension you requested.

If you have any questions about this letter, please call us at (205) 801-3589. If you do call, please have this letter with you. It will help us answer your questions. You can also write to us at the address shown at the top of this letter, or you may fax a message to us at (205) 801-3595.

If you have any other questions, you should contact the United Mine Workers of America Combined Benefit Fund at the address below:

UMWA Combined Benefit Fund
4455 Connecticut Avenue, N.W.
Washington, D.C. 20008
((202) 895-3700

/s/ QUITTIE C. WILSON
QUITTIE C. WILSON
Assistant Regional Commissioner
Processing Center Operations

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO

CIVIL ACTION No. C2-99-532
JUDGE KINNEARY
MAGISTRATE JUDGE KING

BELLAIRE CORPORATION, NACCO INDUSTRIES, INC., AND THE NORTH AMERICAN COAL CORPORATION,
PLAINTIFFS

v.

KENNETH S. APFEL, COMMISSIONER OF SOCIAL SECURITY, DEFENDANT

ANSWER OF THE TRUSTEES OF THE UMWA COMBINED BENEFIT FUND

The Trustees of the UMWA Combined Benefit Fund (the "Trustees"), answer the Complaint of Bellaire Corporation ("Bellaire"), NAACO Industries, Inc. ("NACCO"), and The North American Coal Corporation ("North American") as follows:

INTRODUCTION

1. The first sentence of Paragraph 1 of the Complaint constitutes Plaintiffs' characterization of their allegations, which the Trustees need not admit or deny. To the extent that any response is required, the Trustees deny that Plaintiffs are entitled to any relief. The Trustees are without sufficient knowledge or information to form a belief as to the truth of the remaining allegations in Paragraph 1 of the Complaint.

2. The first sentence of Paragraph 2 of the Complaint constitutes Plaintiffs' characterization of their allegations, which the Trustees need not admit or deny. To the extent that any response is required, the Trustees deny that Plaintiffs are entitled to any relief. The Trustees deny the remaining allegations in paragraph 2 of the Complaint.

3. The first sentence of Paragraph 3 of the Complaint constitutes Plaintiffs' characterization of their allegations, which the Trustees need not admit or deny. To the extent that any response is required, the Trustees deny that Plaintiffs' are entitled to any relief. The second sentence of Paragraph 3 of the Complaint asserts conclusions of law, which the Trustees need not admit or deny. To the extent that any response is required, the Supreme Court's decision in *Eastern* v. *Apfel*, 524 U.S. 498 (1998) (hereinafter "*Eastern*"), speaks for itself. Upon information and belief, the Trustees admit that the Commissioner voided assignments of Combined Fund beneficiaries made to numerous coal operators; the Trustees are without sufficient information or knowledge to form a belief as to the truth of the remaining allegations in the third sentence of Paragraph 3 of the Complaint. Upon information and belief, the Trustees admit that Independent Coal & Coke Company ("ICC") and Cambria Mining Company ("Cambria" were signatory to National Bituminous Coal Wage Agreements ("NBCWAs"); the Trustees are without sufficient information or knowledge to form a belief as to the truth of the remaining allegations in the fourth sentence of Paragraph 3 of the Complaint. The Trustees deny the remaining allegations in Paragraph 3, and aver that Plaintiffs are not similarly situated to Eastern Enterprises, the petitioner in *Eastern*. Unlike

Eastern Enterprises, Plaintiff Bellaire, a "related person" under the Coal Act to Plaintiff's NACCO and North American, signed 1974 and later NBCWAs, including the NBCWAs of 1974, 1981, and 1984, each of which expressly referred to lifetime health benefits for retired coal miners and their dependents. Moreover, during the terms of the 1974 and 1978 NBCWAs, Bellaire was a member of the Bituminous Coal Operators' Association, Inc. ("BCOA"), which negotiated the terms and conditions of those NBCWAs on Bellaire's behalf. Although Bellaire withdrew from the BCOA in December 1980, it was a "me, too" signatory to the 1981 and 1984 NBCWAs and signed two extension agreements that obligated it to provide health benefits to its own retirees until January 20, 1990. *Bellaire Corp v. Shalala*, 995 F. Supp. 125, 130 (D.D.C. 1997).

4. The first sentence of Paragraph 4 of the Complaint constitutes Plaintiffs' characterization of their allegations, which the Trustees need not admit or deny. To the extent that any response is required, the Trustees deny that Plaintiffs are entitled to any relief. The Trustees deny the remaining allegations of Paragraph 4 of the Complaint.

5. The first sentence of Paragraph 5 of the Complaint constitutes Plaintiffs' characterization of their allegations, which the Trustees need not admit or deny. To the extent that any response is required, the Trustees are without sufficient knowledge or information to form a belief as to the truth of the allegations in Paragraphs 5 of the Complaint.

6. The first sentence of Paragraph 6 of the Complaint constitutes Plaintiffs' characterization of their allegations, which the Trustees need not admit or deny.

The remaining sentences of Paragraph 6 of the Complaint assert conclusions of law, which the Trustees need not admit or deny. To the extent that any response is required, the Trustees rely on the language of the Coal Act pertaining to joint and several liability and SSA's assignment process, which speaks for itself. The Trustees otherwise are without sufficient knowledge or information to form a belief as to the truth of the allegations in Paragraph 6 of the Complaint.

PARTIES

7. The Trustees are without sufficient knowledge or information to form a belief as to the truth of the allegations in Paragraph 7 of the Complaint.

8. The Trustees are without sufficient knowledge or information to form a belief as to the truth of the allegations in Paragraph 8 of the Complaint.

9. The Trustees are without sufficient knowledge or information to form a belief as to the truth of the allegations in Paragraph 9 of the Complaint.

10. The Trustees admit that Kenneth S. Apfel is the Commissioner of Social Security. On information and belief, the Trustees admit the remaining allegations in Paragraph 10 of the Complaint.

JURISDICTION AND VENUE

11. The allegations in Paragraph 11 of the Complaint constitute conclusions of law, which the Trustees need not admit or deny.

12. The allegations in Paragraph 12 of the Complaint constitute conclusions of law, which the Trustees need not admit or deny.

THE ASSIGNMENT PROCESS UNDER THE COAL ACT

13. The allegations in Paragraph 13 of the Complaint constitute conclusions of law, which the Trustees need not admit or deny. To the extent that any response is required, the Trustees rely on the language of the referenced sections of the Coal Act, which speaks for itself.

14. The allegations in Paragraph 14 of the Complaint constitute conclusions of law, which the Trustees need not admit or deny. To the extent that any response is required, the Trustees rely on the language of the referenced section of the Coal Act, which speaks for itself.

15. The allegations in Paragraph 15 of the Complaint constitute conclusions of law, which the Trustees need not admit or deny. To the extent that any response is required, the Trustees rely on the language of the referenced sections of the Coal Act, which speaks for itself.

16. The allegations in Paragraph 16 of the Complaint constitute conclusions of law, which the Trustee need not admit or deny. To the extent that any response is required, the Trustees rely on the language of the referenced sections of the Coal Act, which speaks for itself.

17. The allegations in Paragraph 17 of the Complaint constitute conclusions of law, which the Trustees need not admit or deny. To the extent that any response is required, the Trustees rely on the language of the referenced sections of the Coal Act, which speaks for itself.

COUNT I

18. The Trustees restate and incorporate by reference herein their responses to the allegations set forth in Paragraphs 1-17 of the Complaint in response to Paragraph 18 of the Complaint.

19. Upon information and belief, the Trustees admit that the Commissioner has issued internal guidelines for making assignments under the Coal Act. The remaining allegations in Paragraph 19 of the Complaint, which purport to describe and characterize the Commissioner's guidelines, need not be admitted or denied. The Trustees rely on the language of the Commissioner's guidelines to speak for itself.

20. The Trustees are without sufficient knowledge or information to form a belief as to the truth of the allegations in Paragraph 20 of the Complaint.

21. The Trustees are without sufficient knowledge or information to form a belief as to the truth of the allegations in Paragraph 21 of the Complaint.

22. The Trustees are without sufficient knowledge or information to form a belief as to the truth of the first sentence in Paragraph 22 of the Complaint. The allegations in the second sentence of Paragraph 22 of the Complaint constitute conclusions of law, which the Trustees need not admit or deny. To the extent that any responses is required, the Trustees rely on the language of the referenced section of the Coal Act, which speaks for itself. Answering further, the Trustees deny that an assigned operator must have common ownership or a partnership with a signatory operator to qualify as a "related person" under the Coal Act.

23. The Trustees are without sufficient knowledge or information to form a belief as to the truth of the allegations in Paragraph 23 of the Complaint.

24. The allegations in Paragraph 24 of the Complaint constitute conclusions of law, which the Trustees need not admit or deny. To the extent that any response is required, the Trustees rely on the language of the referenced section of the Code of Federal Regulations, which speaks for itself.

25. The Trustees are without sufficient knowledge or information to form a belief as to the truth of the allegations in Paragraph 25 of the Complaint.

26. The Trustees are without sufficient knowledge or information to form a belief as to the truth of the allegations in Paragraph 26 of the Complaint.

27. The Trustees are without sufficient knowledge or information to form a belief as to the truth of the allegations in Paragraph 27 of the Complaint. Answering further, the Trustees deny Plaintiffs' allegation in the second sentence of Paragraph 27 of the Complaint that the Coal Act does not permit the Commissioner to assign miners to successors of signatory operators.

28. The Trustees are without sufficient knowledge or information to form a belief as to the truth of the allegations in Paragraph 28 of the Complaint.

29. The Trustees are without sufficient knowledge or information to form a belief as to the truth of the allegations in subheading (b) of Paragraph 29 of the Complaint. The Trustees deny the remaining allegations in Paragraph 29 of the Complaint.

30. The Trustees deny the allegations in Paragraph 30 of the Complaint.

COUNT II

31. The Trustees restate and incorporate by reference herein their responses to the allegations set forth in paragraphs 1-30 of the Complaint in response to Paragraph 31 of the Complaint.

32. Upon information and belief, the Trustees admit that the Commissioner has issued internal guidelines for making assignments under the Coal Act. The remaining allegations in Paragraph 32 of the Complaint, which purport to describe and characterize the Commissioner's guidelines, need not be admitted or denied. The Trustees rely on the language of the Commissioner's guidelines to speak for itself.

33. The Trustees are without sufficient knowledge or information to form a belief as to the truth of the allegations in Paragraph 33 of the Complaint.

34. The Trustees are without sufficient knowledge or information to form a belief as to the truth of the allegations in Paragraph 34 of the Complaint.

35. The Trustees are without sufficient knowledge or information to form a belief as to the truth of the first sentence of Paragraph 35 of the Complaint. The remaining allegations in Paragraph 35 of the Complaint constitute conclusions of law, which the Trustees need not admit or deny. To the extent that any response is required, the Trustees rely on the language of the referenced section of the Coal Act, which speaks for itself. Answering further, the Trustees deny that an assigned operator must have common ownership or a partnership with a signatory operator to qualify as a "related person" under the Coal Act.

36. The Trustees are without sufficient knowledge or information to form a belief as to the truth of the allegations in Paragraph 36 of the Complaint.

37. The allegations in Paragraph 37 of the Complaint constitute conclusions of law, which the Trustees need not admit or deny. To the extent that any response is required, the Trustees rely on the language of the referenced section of the Code of Federal Regulations, which speaks for itself.

38. The Trustees are without sufficient knowledge or information to form a belief as to the truth of the allegations in Paragraph 38 of the Complaint.

39. The Trustees are without sufficient knowledge or information to form a belief as to the truth of the allegations in Paragraph 39 of the Complaint.

40. The Trustees are without sufficient knowledge or information to form a belief as to the truth of the allegations in Paragraph 40 of the Complaint. Answering further, the Trustees deny Plaintiffs' allegation in the second sentence of Paragraph 40 of the Complaint that the Coal Act does not permit the Commissioner to assign miners to successors of signatory operators.

41. The Trustees are without sufficient knowledge or information to form a belief as to the truth of the allegations in Paragraph 41 of the Complaint.

42. The Trustees deny the allegations in Paragraph 42 of the Complaint.

43. The Trustees deny the allegations in Paragraph 43 of the Complaint.

COUNT III

44. The Trustees restate and incorporate by reference herein their responses to the allegations set forth in paragraphs 1-43 of the Complaint in response to Paragraph 44 of the Complaint.

45. Paragraph 45 asserts conclusions of law, which need not be admitted or denied. To the extent that any answer is required, the Supreme Court's decision in *Eastern* speaks for itself.

46. Upon information and belief, the Trustees admit that the Commissioner voided assignments of Combined Fund beneficiaries made to numerous coal operators. The Trustees are without sufficient knowledge or information to form a belief as to the remaining allegations in Paragraph 46 of the Complaint.

47. Upon information and belief, ICC was signatory to an NBCWA; the Trustees are without sufficient information or knowledge to form a belief as to the truth of the remaining allegations in Paragraph 47 of the Complaint.

48. Upon information and belief, Cambria was signatory to an NBCWA; the Trustees are without sufficient information or knowledge to form a belief as to the truth of the remaining allegations in Paragraph 48 of the Complaint.

49. The Trustees are without sufficient knowledge or information to form a belief as to the truth of the allegations in Paragraph 49 of the Complaint.

50. The Trustees are without sufficient knowledge or information to form a belief as to the truth of the allegations in Paragraph 50 of the Complaint.

51. The Trustees are without sufficient knowledge or information to form a belief as to the truth of the allegations in Paragraph 51 of the Complaint.

52. Upon information and belief, the Trustees admit that the Commissioner did not void the assignments of the ICC and Cambria miners (and their dependents) to Plaintiffs. The Trustees deny any remaining allegations in Paragraph 52 of the Complaint.

53. The Trustees deny the allegations in Paragraph 53 of the Complaint. Answering further, the Trustees aver that Plaintiffs are not similarly situated to Eastern Enterprises, the petitioner in *Eastern*.

54. The Trustees deny the allegations in Paragraph 54 of the Complaint.

COUNT IV

55. The Trustees restate and incorporate by reference herein their responses to the allegations set forth in paragraphs 1-54 of the Complaint in response to Paragraph 55 of the Complaint.

56. The allegations in Paragraph 56 of the Complaint constitute conclusions of law, which the Trustees need not admit or deny. To the extent that any response is required, the Trustees rely on the language of the Coal Act, which speaks for itself. The Trustees deny, however, that under the Coal Act, any original assignments made by the Commissioner after September 30, 1993, are, merely by virtue of their date, unlawful.

57. The allegations in Paragraph 57 of the Complaint constitute conclusion of law, which the Trustees need not admit or deny. To the extent that any response is required, the Trustees rely on the language of the Coal Act, which speaks for itself. The Trustees deny, how-

ever, that under the Coal Act, any original assignments made by the Commissioner after September 30, 1993, are, merely by virtue of their date, unlawful.

58. The allegations in Paragraph 58 of the Complaint constitute conclusions of law, which the Trustees need not admit or deny. To the extent that any response is required, the Trustees rely on the language of the Coal Act, which speaks for itself.

59. The Trustees are without sufficient knowledge or information to form a belief as to the truth of the allegations in Paragraph 59 of the Complaint.

60. The Trustees are without sufficient knowledge or information to form a belief as to the truth of the factual allegations in Paragraph 60 of the Complaint. The Trustees deny, however, that any assignments made by the Commissioner to the Bellaire Group after September 30, 1993 are, merely by virtue of their date, "unlawful" or in violation of the Coal Act.

61. The Trustees are without sufficient knowledge or information to form a belief as to the truth of the allegations in Paragraph 61 of the Complaint. Answering further, the Trustees deny that any assignments made by the Commissioner after September 30, 1993, are, merely by virtue of their date, unlawful.

62. The allegation in Paragraph 62 of the Complaint that "[t]he Commissioner's making of original assignments after September 30, 1993 presents a pure question of law as to which a request for administrative review would have been futile," constitutes a conclusion of law, which the Trustees need not admit or deny. To the extent that any response is required, the Trustees rely on the language of the Coal Act, which speaks for itself. The Trustees are without sufficient knowledge

or information to form a belief as to the truth of the remaining allegations in Paragraph 62 of the Complaint.

63. The Trustees deny the allegations in Paragraph 63 of the Complaint.

64. The Trustees deny the allegations in Paragraph 64 of the Complaint.

COUNT V

65. The Trustees restate and incorporate by reference herein their responses to the allegations set forth in paragraphs 1-64 of the Complaint in response to Paragraph 65 of the Complaint.

66. The Trustees are without sufficient knowledge or information to form a belief as to the truth of the allegations in Paragraph 66 of the Complaint.

67. The allegations in Paragraph 67 of the Complaint constitute conclusions of law, which the Trustees need not admit or deny. To the extent that any response is required, the Trustees rely on the language of the referenced section of the Code of Federal Regulations, which speaks for itself.

68. The Trustees are without sufficient knowledge or information to form a belief as to the truth of the allegations in Paragraph 68 of the Complaint.

69. The Trustees are without sufficient knowledge or information to form a belief as to the truth of the allegations in Paragraph 69 of the Complaint.

70. The Trustees are without sufficient knowledge or information to form a belief as to the truth of the allegations in Paragraph 70 of the Complaint.

71. The Trustees are without sufficient knowledge or information to form a belief as to the truth of the allegations in Paragraph 71 of the Complaint.

72. The Trustees are without sufficient knowledge or information to form a belief as to the truth of the allegations in Paragraph 72 of the Complaint.

73. The Trustees are without sufficient knowledge or information to form a belief as to the truth of the allegations in Paragraph 73 of the Complaint.

74. The Trustees are without sufficient knowledge or information to form a belief as to the truth of the allegations in Paragraph 74 of the Complaint.

COUNT VI

75. The Trustees restate and incorporate by reference herein their responses to the allegations set forth in paragraphs 1-74 of the Complaint in response to Paragraph 75 of the Complaint.

76. Paragraph 76 of the Complaint asserts conclusions of law, which the Trustees need not admit or deny. To the extent that any response is required, the Trustees rely on the language of the Coal Act pertaining to joint and several liability and SSA's assignment process, which speaks for itself.

77. The first and second sentences of Paragraph 77 of the Complaint assert conclusions of law, which the Trustees need not admit or deny. To the extent that any response is required, the Trustees rely on the language of the Coal Act pertaining to joint and several liability and SSA's assignment process, which speaks for itself. The Trustees otherwise are without sufficient knowledge or information to form a belief as to the

truth of the allegations in Paragraph 77 of the Complaint.

78. The Trustees are without sufficient knowledge or information to form a belief as to the truth of the allegations in Paragraph 78 of the Complaint.

79. The Trustees are without sufficient knowledge or information to form a belief as to the truth of the allegations in Paragraph 79 of the Complaint.

80. The Trustees are without sufficient knowledge or information to form a belief as to the truth of the allegations in Paragraph 80 of the Complaint.

81. The Trustees are without sufficient knowledge or information to form a belief as to the truth of the allegations in Paragraph 81 of the Complaint.

82. The Trustees are without sufficient knowledge or information to form a belief as to the truth of the allegations in Paragraph 82 of the Complaint.

83. The Trustees are without sufficient knowledge or information to form a belief as to the truth of the allegations in Paragraph 83 of the Complaint.

84. Any allegations in the Complaint not expressly admitted or otherwise specifically addressed in the foregoing paragraphs are denied.

PRAYER FOR RELIEF

With respect to Counts I through IV, the Trustees deny that Plaintiffs are entitled to any of the relief requested in their Prayer for Relief or to any relief whatsoever. With respect to Counts V and VI, the Trustees currently lack sufficient knowledge or information to form a belief as to whether Plaintiffs are entitled to any relief.

AFFIRMATIVE DEFENSES

1. The Complaint, or parts of it, fails to state a claim upon which relief can be granted.

2. Plaintiffs' claims, or some of them, are barred by the doctrine of *res judicata.*

3. Plaintiffs' claims, or some of them, are barred by the statute of limitations and/or laches.

Respectfully submitted,

/s/ ALVIN J. McKENNA
ALVIN J. MCKENNA, Trial Attorney
Ohio Supreme Court No. 0023145
PORTER, WRIGHT, MORRIS &
ARTHUR, LLP
41 South High Street
Columbus, Ohio 43215-6194

Peter Buscemi, Of Counsel
Margaret Scott Izzo, Of Counsel
MORGAN, LEWIS & BOCKIUS LIP
1800 M Street, N.W.
Washington, D.C. 20036
(202) 467-7190

John R. Mooney, Of Counsel
Nadine Gjurich, Of Counsel
MOONEY, GREEN, BAKER,
GIBSON, & SAINDON, P.C.
700 14th Street, N.W.
Suite 1100
Washington, D.C. 20005
(202) 783-0010

David W. Allen, Of Counsel
Office of the General Counsel
UMWA HEALTH AND RETIREMENT
FUNDS
4455 Connecticut Ave., N.W.
Washington, D.C. 20008
(202) 895-3737

Counsel for the Trustees of the UMWA Combined Benefit Fund

November 8, 1999

Social Security Administration
Important Information

Great Lakes Program Service Center
P.O. Box 87109
Chicago, Illinois 60680
Date: 09/28/93

CREDIT UNIONS CHARTERED IN THE
SUNNYSIDE
PO BOX F
UT 84539-0000 EIN: 87-0236316

We are writing to you about the Coal Industry Retiree Health Benefit Act of 1992. Under this law, we must assign responsibility as explained below for the payment of health and death benefit premiums for retired miners and their relatives who qualify. To qualify, the miners or their relatives must have been qualified for and receiving benefits under a prior United Mine Workers of America (UMWA) benefit plan as of July 20, 1992.

We have reviewed our earnings records of retired coal miners identified by the UMWA benefit plans and decided that you are the operator responsible for the premiums for the beneficiaries named on the enclosed list. This list also explains why we have assigned you responsibility for the benefit premiums of these beneficiaries.

You will hear from the UMWA Combined Benefit Fund with more information about the benefit premiums. We will let you know of any other assignments we may make to you.

To Whom We May Assign Responsibility for Premiums

We may assign responsibility for premiums to either:

- a signatory operator that formerly employed the miner, or
- a company related to such signatory operator that is no loner in business.

Who is a Signatory Operator and Its Related Company

A signatory operator is an employer who signed an agreement with the UMWA meeting certain requirements of the new law. A related company is either:

- a member of the controlled group of corporations (within the meaning of 26 United States Code (U.S.C.) 52(a)) that includes the signatory operator; or
- a trade or business under common control (as determined by 26 U.S.C. 52(b)) with the signatory operator; or
- any other person, other than a limited partner, having a partnership interest or joint venture with a signatory operator in a business within the coal industry that employed the miner; or
- a successor in interest to any of the companies described above.

A related company must have met one of the four conditions defined above as of July 20, 1992, or if earlier, right before the signatory ceased to be in business.

How We Assign Responsibility

We assign responsibility to an operator who our records show employed the miner in the coal industry under the UMWA agreement. The operator

must still be in business. If the operator is no longer in business, we assign responsibility to the operator's related company that is still in business. We assign responsibility using the following order of priority:

- the last operator to employ the miner under an agreement for at least two years if that operator was also a signatory to a 1978 or later agreement; or
- the last operator to employ the miner under an agreement if that operator was also a signatory to a 1978 or later agreement; or
- the operator who employed the miner under an agreement for the longest period of time before 1978.

If the signatory operator that employed the miner is no longer in business, its premium responsibility must be assumed by any related company still in business.

If You Disagree

If you disagree with the assignment to you of anyone on the enclosed list, you have the right to ask us to review the assignment. But first, you may want to write us to the address at the top of this letter and ask to see the miner's earnings record and the basis for the assignment. After looking at this information, if you still disagree, you can write to us at the same address and ask us to review the assignment.

To ask for a review, you must explain in writing why you disagree and either give us evidence that, standing alone, shows our assignment was in error or

ask for extra time to gather evidence. If you do not give us evidence, we will not review the assignment.

Some examples of evidence we would consider include federal, State or local tax records and legal documents such as incorporation, merger and bankruptcy papers, health and safety reports filed with federal or State agencies that regulate mining activity, payroll and other employment business records, and information in trade journals and newspapers.

- You have 30 days from the day you receive this letter to either request the earnings record and the basis for the assignment or ask for a review.
- If you request the earnings record and the basis for the assignment, the 30 days to ask for a review start the day after you receive them. If you do not request this information, the 30 days to ask for a review start the day after you receive this letter.
- If you want extra time to gather evidence, you must ask for it in your written request for review. You will then have 90 days from the day you request a review to give us the evidence you want us to consider.

Unless you show otherwise, we assume that you receive any letter from us within 5 days of the date on the letter.

If You Have Any Questions

If you have any questions about this letter, please call us at 312-353-4804. If you do call please have this letter with you. It will help us answer your questions.

You can also write to us at the address shown at the top of this letter. Please write to us if you want us to review the assignment.

If you have any questions about your responsibilities as an assigned operator under this new law, you should contact the UMWA Combined Benefit Fund at the address below:

UMWA Combined Benefit Fund
4455 Connecticut Ave., N.W.
Washington, D.C. 20008

/s/ [illegible]
Assistant Regional Commissioner
Processing Center Operations

List of Assigned Miners and Other Beneficiaries

Below we identify the miner(s) and their eligible relatives that we have assigned to you. We also show the reason we believe you are responsible for the coal industry health and death benefit premiums for those individuals.

Our records show that you employed the miner in the coal industry under an UMWA agreement and you are still in business. Also, you were the last operator to employ the miner under an agreement for at least two years, and you were a signatory to a 1978 or later agreement.

NOTE: Entries under "Dates Miner Employed" that display only the month and year indicate that the miner worked for one or more months in the calendar quarter ending with the month displayed.

Asterisk (*) denotes miner.

Miners and Other Beneficiaries	SSN	Dates Miner Employed
		03/46-06/48

List of Assigned Miners and Other Beneficiaries

Below we identify the miner(s) and their eligible relatives that we have assigned to you. We also show the reason we believe you are responsible for the coal industry health and death benefit premiums for those individuals.

Our records show that you employed the miner in the coal industry under an UMWA agreement and you are still in business. Also, you were the operator who employed the miner named below under an UMWA agreement for the longest period of time before 1978.

NOTE: Entries under "Dates Miner Employed" that display only the month and year indicate that the miner worked for one or more months in the calendar quarter ending with the month displayed.

Asterisk (*) denotes miner.

Dates Miner Employed
01/46-03/51
03/46-12/46
06/47-06/47

List of Assigned Miners and Other Beneficiaries

Below we identify the miner(s) and their eligible relatives that we have assigned to you. We also show the reason we believe you are responsible for the coal industry health and death benefit premiums for those individuals.

Our records and UMWA records indicate that you are related to the signatory operator named below who is no longer in business. This operator would have been responsible under the law for the miner named below under the rules for how we assigned responsibility explained on page 2. Therefore, as a related company you must assume responsibility.

NOTE: Entries under "Dates Miner Employed" that display only the month and year indicate that the miner worked for one or more months in the calendar quarter ending with the month displayed.

Asterisk (*) denotes miner.

Miners and Other Beneficiaries	SSN	Dates Miner Employed by Signatory Company	Signatory Operator Name
			UTAH FUEL CO
			UTAH FUEL CO
			UTAH FUEL CO
			UTAH FUEL CO
			UTAH FUEL CO

		UTAH FUEL CO
		UTAH FUEL CO
GORDON WALLACE	01/46-03/51	UTAH FUEL CO
		UTAH FUEL CO
		UTAH FUEL CO
THOMAS LEL. .ND J	10/46-09/48 01/49-03/51	UTAH FUEL CO
THOMAS CLARA H		

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO

CIVIL ACTION No. C2-99-532
JUDGE KINNEARY
MAGISTRATE JUDGE KING

BELLAIRE CORPORATION, NACCO INDUSTRIES, INC., AND THE NORTH AMERICAN COAL CORPORATION,
PLAINTIFFS

v.

KENNETH S. APFEL, COMMISSIONER OF SOCIAL SECURITY ADMINISTRATION, DEFENDANT

DECLARATION OF RICHARD HARRON

I, Richard Harron, declare as follows:

1. I am the Director of the Division of Coverage and Support, Office of Program Benefits, Office of the Deputy Commissioner for Disability and Income Security Programs, Social Security Administration (SSA). The Office of the Deputy Commissioner for Disability and Income Security Programs is the SSA component responsible for, among other things, coordinating implementation of the Coal Act for the Commissioner of Social Security. The information contained in this declaration has been supplied to me by several individuals in various SSA components and is true and correct to the best of my knowledge and belief.

2. In October 1992, Congress enacted the Coal Industry Retiree Health Benefit Act of 1992 (the Coal

Act), Pub. L. No. 102-486, 106 Stat. 3036 (now codified at 26 U.S.C. 9706-22) which directs the Commissioner of Social Security (the Commissioner) to match beneficiaries of the 1950 and 1984 United Mine Workers of America (UMWA) Benefit Plans with the signatory coal industry operator responsible for paying their health and death benefit premiums.

3. Although the Coal Act directed SSA to assign coal miners to appropriate coal operators according to particular criteria contained in the law, SSA could not expend any administrative resources to implement the relevant provisions of the law without a specific budgetary authorization from Congress. Congress did not provide this budgetary appropriation until July 2, 1993. Thus, SSA did not have the budgetary authority to even begin processing the massive agency workload created by the Coal Act until July 1993.

4. The agency workload created by the Coal Act was substantial. Before the process of assigning beneficiaries to coal operators could even begin, however, SSA had to develop and publish regulations, develop internal operating procedures, negotiate with each local union in the regions where the workload was to be performed, and train the agency employees to process the workload in an appropriate manner. In order to properly assign beneficiaries to coal operators, SSA was required to review the earnings records of each miner identified by the UMWA Combined Benefit Fund (the Combined Fund) as an eligible beneficiary for assignment under the provisions of the Coal Act. In November 1992, the Combined Fund sent a list to SSA which contained the names and Social Security account numbers of approximately 86,000 miners who the

Combined Fund identified as eligible for assignment under the provisions of the Coal Act. SSA was required to review the earnings record of each miner, consider every mining company which employed the miner during his lifetime, and match the miner with the appropriate mining company pursuant to the criteria established in the Coal Act. In order to determine which operators actually employed each of the miners, SSA had to retrieve and review earnings records dating back to 1946. The retrieval of the miners' earnings records before 1978 was an especially labor-intensive operation since this information is only maintained on microfilmed files.

5. Once SSA identified a responsible operator for each miner, SSA had to determine whether the responsible operator was still in business. If SSA determined that the operator was no longer in business, SSA had to determine whether the miner could be assigned to a "related person" of the operator as defined in the Coal Act.

6. Despite the fact that SSA did not receive Congressional budgetary authorization to begin processing the Coal Act workload until July 1993, SSA was able to assign a large majority of the eligible beneficiaries by September 30, 1993. By September 30, 1993, SSA had assigned 38,615 miners to specific coal operators and made initial determinations that 20,005 miners could not be properly assigned to specific coal operators based on information available at that time. In addition, SSA secured stipulations from 15 coal operators establishing responsibility for 16,281 additional beneficiaries. In fact, by September 30, 1993, SSA had matched 74,901 miners with specific coal operators (or

their companies), or placed them in the unassigned pool, according to the criteria set forth in the Coal Act.

7. SSA implemented provisions of the Coal Act with the understanding that Congress intended SSA to assign the greatest number of miners to appropriate coal operators and to limit, as much as possible, the number of unassigned beneficiaries. Although SSA managed to make initial evaluations regarding a large majority of the eligible miners during the brief period between July 1993 and September 30, 1993, some miners still had to be initially evaluated as of October 1, 1993. In addition, it was recognized that some of the assignments made during that period might have to be changed in the future if additional information warranting such a change became available to the agency. Moreover, it was recognized that many of the miners who were designated as unassigned prior to October 1, 1993, could still be properly assigned to coal operators if the agency had additional time to review records and information regarding existing coal operators who might be related to coal operators no longer in business. Thus, SSA continued to work on implementing the provisions of the Coal Act after September 30, 1993. By April 1, 1994, SSA was able to complete its evaluation of the miners that had not been initially assigned as of October 1, 1993, and determined that 2,264 of these miners could be properly assigned to coal operators.

8. In November 1993, the Combined Fund informed SSA that they had conducted a random sampling review of the pool of 20,005 initially unassigned miners and had determined that many of these miners could be properly assigned to specific coal operators. SSA considered the information provided by

the Combined Fund which related to the operating status of various coal operators and their related companies, and determined that the pool of initially unassigned miners should be reviewed. However, SSA's workload resources at that time had to be directed toward responding to the numerous requests for review from the coal operators which arose out the round of initial assignments made by September 30, 1993. Coal operators challenging the initial assignments normally requested miners' earnings records and other documentation which SSA relied upon to make the initial assignments. But SSA's Program Service Centers (PSCs), the regional operational facilities where the initial assignments and reviews were performed, had to rely upon an automated delivery system to print and mail the earnings records to the requesting operators, and this system was not operational until April 1994. Also during this period, SSA's Office of Systems was developing the national database for the PSCs to facilitate miner-specific reviews. The PSCs could not control the review of the thousands of miner-specific assignments without an electronic system that could facilitate the exchange of data between the PSCs so that everyone had instant access to the information that was being updated daily. Therefore, SSA could not begin directing resources toward reviewing the pool of initially unassigned miners until 1995.

9. SSA began reviewing the pool of initially unassigned miners in January 1995. However, since SSA mails all assignment notices at the same time, none of the initially unassigned miner notices were sent until a first batch of reviews was completed in June 1995. A second round of initially unassigned miner notices was

sent in September 1995. SSA assigned 5,301 miners from the pool of initially unassigned miners.

10. On April 8, 1998, the Combined Fund sent SSA a list of additional eligible beneficiaries who had not been included in the first list sent in 1992 because the beneficiaries had been in suspended pay status when the Combined Fund compiled their 1992 list of eligible beneficiaries. In response to this new information, SSA initially assigned 278 additional miners on September 22, 1997.

Pursuant to 28 U.S.C. Section 1746, I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge and belief.

Executed on: 4/26/00 /s/ RICHARD HARRON
RICHARD HARRON

APR 8 2002

Nos. 01-705 and 01-715

In the Supreme Court of the United States

JO ANNE B. BARNHART, COMMISSIONER OF SOCIAL SECURITY, PETITIONER

v.

PEABODY COAL COMPANY, ET AL.

MICHAEL H. HOLLAND, ET AL., PETITIONERS

v.

BELLAIRE CORPORATION, ET AL.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE FEDERAL PETITIONER

THEODORE B. OLSON
Solicitor General
Counsel of Record

ROBERT D. MCCALLUM, JR.
Assistant Attorney General

EDWIN S. KNEEDLER
Deputy Solicitor General

PAUL R.Q. WOLFSON
Assistant to the Solicitor General

WILLIAM KANTER
JEFFREY CLAIR
Attorneys

Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

QUESTION PRESENTED

The Coal Industry Retiree Health Benefit Act of 1992 (Coal Act or Act), 26 U.S.C. 9701-9722 (1994 & Supp. V 1999), established the United Mine Workers of America Combined Benefit Fund (Combined Fund) to ensure the continued provision of health-care benefits to retired coal miners who worked under collective bargaining agreements that promised such benefits. Those benefits are financed principally through premiums paid to the Combined Fund by "signatory operators" that employed miners under those collective bargaining agreements and are assigned responsibility for their retired miners' benefits. The Act provides that the Commissioner of Social Security "shall, before October 1, 1993," assign responsibility for each eligible retired coal miner to an appropriate signatory operator that employed the miner (or to a "related person" of a signatory operator). 26 U.S.C. 9706(a). The Commissioner was unable, however, to complete all such assignments before October 1, 1993.

The question presented is whether the Commissioner's assignments of responsibility for retired miners that were made on or after October 1, 1993, are void.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	2
Statutory provision involved	2
Statement	3
Summary of argument	14
Argument:	
The Coal Act does not extinguish the Commissioner of Social Security's authority to make beneficiary assignments as of October 1, 1993	16
A. The text, structure, and purposes of the Coal Act show that the Commissioner retained authority to make initial assignments of Combined Fund beneficiaries on or after October 1, 1993	18
1. A statutory directive that an agency take action by a particular date is ordinarily not read to bar the agency from acting after that date	18
2. Nothing in the Coal Act suggests that Congress intended to bar the Commissioner from making assignments on or after October 1, 1993	19
B. The Sixth Circuit's reading of the Coal Act's provisions governing the calculation of unassigned beneficiary premiums as limiting the Commissioner's assignment authority is erroneous	31
C. Congress's subsequent enactment of an appropriations law to allow the Commissioner to perform her responsibilities under the Coal Act shows that the Commissioner's assignment authority did not terminate on October 1, 1993	36

TABLE OF CONTENTS—Continued: Page

D. The Commissioner's construction of her authority to make assignments on or after October 1, 1993, is entitled to deference 39
Conclusion 41
Appendix 1a

TABLE OF AUTHORITIES

Cases:

Acosta v. *Louisiana Dep't of Health & Human Res.*, 478 U.S. 251 (1986) 30
Apogee Coal Co. v. *Holland* (N.D. Ala. June 1, 2001), appeal pending, No. 01-13691 (11th Cir.) 34
Barnhart v. *Sigmon Coal Co.*, 122 S. Ct. 941 (2002) 4, 23, 25, 26
Barnhart v. *Walton*, No. 00-1937 (Mar. 27, 2002) 40
Brock v. *Pierce County*, 476 U.S. 253 (1986) 18, 19
Chevron U.S.A. Inc. v. *Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984) 40
Cisneros v. *Alpine Ridge Group*, 508 U.S. 10 (1993) 30
Dixie Fuel Co. v. *Commissioner of Soc. Sec.*, 171 F.3d 1052 (6th Cir. 1999) 11, 12, 13, 31, 32, 33
Eastern Enters. v. *Apfel*, 524 U.S. 498 (1998) 4, 6
French v. *Edwards*, 80 U.S. (13 Wall.) 506 (1872) 18
Holland v. *Pardee Coal Co.*, 269 F.3d 424 (4th Cir. 2001), petition for cert. pending, No. 01-1366 ..... 17, 23, 24, 25, 28, 29
National Cable & Telecomm. Ass'n v. *Gulf Power Co.*, 122 S. Ct. 782 (2002) 40
Regions Hosp. v. *Shalala*, 522 U.S. 448 (1998) 18, 27
TVA v. *Hill*, 437 U.S. 153 (1978) 39
United States v. *James Daniel Good Real Prop.*, 510 U.S. 43 (1993) 18, 19, 21
United States v. *Mead Corp.*, 121 S. Ct. 2164 (2001) 40

Cases—Continued: Page

United States v. *Montalvo-Murillo*, 495 U.S. 711 (1990) 18, 19
United States v. *Wells*, 519 U.S. 482 (1997) 21

Statutes and rules:

Coal Industry Retiree Health Benefit Act of 1992, 26 U.S.C. 9701-9722 (1994 & Supp. V 1999) 3
26 U.S.C. 9701(b)(1) 5
26 U.S.C. 9701(c)(1) 5
26 U.S.C. 9701(c)(2) 26
26 U.S.C. 9701(c)(2)(A) 27
26 U.S.C. 9701(c)(7) 5
26 U.S.C. 9702 4
26 U.S.C. 9702(a)(1) 21
26 U.S.C. 9702(a)(2) 8
26 U.S.C. 9702(c) 8
26 U.S.C. 9703(b) 23
26 U.S.C. 9703(b)(1) 5, 21
26 U.S.C. 9703(b)(4) 8
26 U.S.C. 9703(f) 4
26 U.S.C. 9704 ..... 5, 21, 1a
26 U.S.C. 9704(a) 7, 27
26 U.S.C. 9704(a)(3) 6
26 U.S.C. 9704(d) 6, 24, 35
26 U.S.C. 9704(f) 31, 32, 33, 34
26 U.S.C. 9704(f)(1) 12, 31, 32, 33
26 U.S.C. 9704(f)(2) 12, 33, 35
26 U.S.C. 9704(f)(2)(A) 33
26 U.S.C. 9704(f)(2)(B) 33
26 U.S.C. 9704(f)(3) 30
26 U.S.C. 9704(g)(1) 8
26 U.S.C. 9704(h) 10

Statutes and rules—Continued: Page

26 U.S.C. 9704(i)(1)(A) 8, 35
26 U.S.C. 9704(i)(1)(D)(i) 36
26 U.S.C. 9705(a) 8
26 U.S.C. 9705(a)(1) 7
26 U.S.C. 9705(a)(3)(B) 7
26 U.S.C. 9705(b) 8, 24
26 U.S.C. 9706 ..... 21, 28, 1a
26 U.S.C. 9706(a) 2, 5, 6, 8, 22, 26, 28, 29, 30, 31, 37
26 U.S.C. 9706(a)(1) 5
26 U.S.C. 9706(a)(2) 5
26 U.S.C. 9706(a)(3) 6
26 U.S.C. 9706(d) 7
26 U.S.C. 9706(e)(2) 6
26 U.S.C. 9706(f) 7, 28, 29-30
26 U.S.C. 9706(f)(1) 6
26 U.S.C. 9706(f)(2) 6
26 U.S.C. 9706(f)(3) 28, 29, 30, 35
26 U.S.C. 9706(f)(3)(A)(i) 6, 28
26 U.S.C. 9706(f)(3)(A)(ii) 6, 28, 29
26 U.S.C. 9706(f)(3)(B) 6
Energy Policy Act of 1992, Pub. L. No. 102-486, Tit. XIX, § 19142, 106 Stat. 3037 ..... 4, 22, 25
Speedy Trial Act of 1974, 18 U.S.C. 3161 *et seq.*:
18 U.S.C. 3162(a)(1) 20
18 U.S.C. 3162(a)(2) 20
Supplemental Appropriations Act of 1993, Pub. L. No. 103-50, Ch. V, 107 Stat. 254 ..... 9, 37, 38
Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. 1201 *et seq.* 8
30 U.S.C. 1231(c) 8
30 U.S.C. 1232(a) 8
30 U.S.C. 1232(h) 8, 24
30 U.S.C. 1232(h)(4) 35
25 U.S.C. 2710(d)(8)(C) 20
25 U.S.C. 2710(e) 20
31 U.S.C. 1102 38

Statute and rules—Continued: Page

42 U.S.C. 1396n(h) (1994 & Supp. V. 1999) 20
49 U.S.C. 15901(c) (Supp. V 1999) 20
Fed. R. Civ. P.:
Rule 54(b) 13
Rule 58 13

Miscellaneous:

Agency Management of the Implementation of the Coal Act, 1998: Hearing Before the Subcomm. on Oversight, Management, and Restructuring, and the District of Columbia of the Senate Governmental Affairs Comm., 105th Cong., 2d Sess. (1998) 11
Coal Industry Retiree Health Benefit Act of 1992: Hearing Before the Subcomm. On Oversight of the House Ways and Means Comm., 104th Cong., 2d Sess. (1995) 9, 10, 38
138 Cong. Rec. 34,002 (1992) 23
Departments of Labor, Health and Human Services, Education, and Related Agencies Appropriations for 1994: Hearings Before a Subcomm. of the House Comm. on Appropriations, 103 Cong., 2d Sess., Pt. 2 (1993) 8-9, 37
General Accounting Office, *Analysis of the Administration's Proposal to Ensure Solvency of the United Mine Workers of America Combined Benefit Fund* (Aug. 15, 2000) 24
General Accounting Office, *Principles of Federal Appropriations Law* (2d ed. 1992):
Vol. 1 39
Vol. 2 38
Provisions Relating to the Health Benefits of Retired Coal Miners: Hearing Before the House Ways and Means Comm., 103d Cong., 1st Sess. (1993) 9, 10, 37

Miscellaneous: Page

Staff of House Comm. on Ways and 103 Cong., 1st Sess., *Financing UMWA Coal Miner "Orphan Retiree" Health Benefits* (Comm. Print 1993) 9, 10

In the Supreme Court of the United States

No. 01-705

JO ANNE B. BARNHART, COMMISSIONER OF SOCIAL SECURITY, PETITIONER

v.

PEABODY COAL COMPANY, ET AL.

No. 01-715

MICHAEL H. HOLLAND, ET AL., PETITIONERS

v.

BELLAIRE CORPORATION, ET AL.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE FEDERAL PETITIONER

OPINIONS BELOW

The opinion of the court of appeals in *Peabody Coal* (Pet. App. 1a-2a)[1] is not published in the *Federal Reporter*, but is reprinted at 14 Fed. Appx. 393. The orders of the district court in *Peabody Coal* (Pet. App. 5a-11a) are unreported.

---

[1] In this brief, "Pet." refers to the government's petition for a writ of certiorari in No. 01-705, and "Pet. App." refers to the appendix to that petition.

The opinion of the court of appeals in *Bellaire* (Pet. App. 3a-4a) is also not published in the *Federal Reporter*, but is reprinted at 14 Fed. Appx. 424. The order of the district court in *Bellaire* (Pet. App. 14a-25a) is unreported.

JURISDICTION

The judgments of the court of appeals in these two cases were entered on June 21, 2001, and June 22, 2001. Pet. App. 1a, 3a. On September 12, 2001, Justice Stevens extended the time within which to file a petition for a writ of certiorari to and including October 19, 2001, and October 20, 2001. On October 10, 2001, Justice Stevens further extended the time within which to file a petition to and including November 18, 2001, and November 19, 2001. The petitions for a writ of certiorari were filed on November 19, 2001 (a Monday). The petitions were granted on January 22, 2002, and the Court consolidated the cases. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTORY PROVISION INVOLVED

Section 9706(a) of Title 26, United States Code, provides:

> For purposes of this chapter, the Commissioner of Social Security shall, before October 1, 1993, assign each coal industry retiree who is an eligible beneficiary to a signatory operator which (or any related person with respect to which) remains in business in the following order:
>
> (1) First, to the signatory operator which—
>
> (A) was a signatory to the 1978 coal wage agreement or any subsequent coal wage agreement, and

> (B) was the most recent signatory operator to employ the coal industry retiree in the coal industry for at least 2 years.
>
> (2) Second, if the retiree is not assigned under paragraph (1), to the signatory operator which—
>
> (A) was a signatory to the 1978 coal wage agreement or any subsequent coal wage agreement, and
>
> (B) was the most recent signatory operator to employ the coal industry retiree in the coal industry.
>
> (3) Third, if the retiree is not assigned under paragraph (1) or (2), to the signatory operator which employed the coal industry retiree in the coal industry for a longer period of time than any other signatory operator prior to the effective date of the 1978 coal wage agreement.

STATEMENT

1. a. Congress enacted the Coal Industry Retiree Health Benefit Act of 1992 (Coal Act or Act), 26 U.S.C. 9701-9722 (1994 & Supp. V 1999), in response to a crisis that threatened to deprive more than 100,000 retired coal miners and their dependents of health-care benefits. Those benefits had been promised to retired coal miners in a series of collective bargaining agreements known as National Bituminous Coal Wage Agreements (NBCWAs). In the 1980s and 1990s, the financial stability of private multi-employer plans that had been established by the coal industry in the NBCWAs to finance those benefits was threatened by increasing health-care costs and the termination of

employers' contribution obligations, as coal mine operators switched to non-union employees or left the coal mining business altogether. As more companies stopped contributing to the plans, the remaining contributors were forced to shoulder more of the costs, which in turn led to even more defections and created a downward spiral. See generally *Barnhart* v. *Sigmon Coal Co.*, 122 S. Ct. 941, 947-948 (2002); *Eastern Enterprises* v. *Apfel*, 524 U.S. 498, 504-514 (1998).[2]

Congress's objectives in enacting the Coal Act were to "identify persons most responsible for plan liabilities in order to stabilize plan funding and allow for the provision of health care benefits to [coal industry] retirees," to "allow for sufficient operating assets for such plans," and to "provide for the continuation of a privately financed self-sufficient program for the delivery of health care benefits to the beneficiaries of such plans." Energy Policy Act of 1992, Pub. L. No. 102-486, Tit. XIX, § 19142, 106 Stat. 3037. In furtherance of those ends, the Coal Act established a private multi-employer plan known as the United Mine Workers of America Combined Benefit Fund (Combined Fund or Fund). The Combined Fund provides health-care benefits to individuals who, at the time the Act was passed, were receiving benefits from the multi-employer plans previously established by collective bargaining in the coal industry. See 26 U.S.C. 9702, 9703(f).

The Combined Fund is financed principally by premiums paid by the "signatory operator[s]" (or "related person[s]" of those signatory operators) that formerly employed the retired miners who are

[2] Except where otherwise indicated, all references in this brief to the *Eastern Enterprises* decision are to the plurality opinion authored by Justice O'Connor in that case.

beneficiaries of the Fund, and that remain in business. 26 U.S.C. 9704, 9706(a). The Act defines "signatory operator" as "a person which is or was a signatory to a coal wage agreement." 26 U.S.C. 9701(c)(1); see 26 U.S.C. 9701(b)(1) (identifying relevant "coal wage agreement[s]").

b. The Act vests in the Commissioner of Social Security (Commissioner) the responsibility for assigning retired miners who are eligible for benefits from the Combined Fund to signatory operators or related persons of those operators. 26 U.S.C. 9706(a). Assignments are made according to a three-tiered hierarchy:

First, the Commissioner must seek to assign a beneficiary to the signatory operator that remains "in business," signed a coal wage agreement in 1978 or later, and was the most recent signatory operator to employ the miner in the coal industry for at least two years (or to any "related person" of such a signatory operator). 26 U.S.C. 9706(a)(1). The Act specifies that "a person shall be considered to be in business if such person conducts or derives revenue from any business activity, whether or not in the coal industry." 26 U.S.C. 9701(c)(7).

Second, if an assignment of a particular beneficiary cannot be made under the first tier, the Commissioner must attempt to assign the beneficiary to the signatory operator that remains in business, signed a coal wage agreement in 1978 or later, and was the most recent signatory operator to employ the miner in the coal industry (or to any related person of such a signatory operator). 26 U.S.C. 9706(a)(2).

Third, if an assignment cannot be made under the first or second tier, the Commissioner must attempt to assign the beneficiary to the signatory operator (or related person) that remains in business and employed

the miner in the coal industry for a longer period of time than any other signatory operator prior to the effective date of the 1978 collective bargaining agreement. 26 U.S.C. 9706(a)(3).[3]

Finally, if an assignment cannot be made under any of the three tiers, then the beneficiary is considered "unassigned." See 26 U.S.C. 9704(a)(3) and (d).

When the Commissioner assigns a Combined Fund beneficiary to a signatory operator or related person, she so notifies the assigned operator, 26 U.S.C. 9706(e)(2), which then has 30 days to request "detailed information as to the work history of the beneficiary and the basis of the assignment," 26 U.S.C. 9706(f)(1). After receiving that information, the assigned operator may request further administrative review of the assignment decision. 26 U.S.C. 9706(f)(2). If, on such administrative review, the Commissioner determines that there was no error in the assignment, she so notifies the assigned operator. 26 U.S.C. 9706(f)(3)(B). If the Commissioner determines that an assignment was incorrect, however, she rescinds the assignment. 26 U.S.C. 9706(f)(3)(A)(i). In that event, the statute provides that "the Commissioner shall review the beneficiary's record for reassignment" to another signatory (or related person) under 26 U.S.C. 9706(a). See 26 U.S.C. 9706(f)(3)(A)(ii).

---

[3] In *Eastern Enterprises*, this Court struck down as unconstitutional an application of the third tier to a signatory operator that had not signed a 1974 or later coal wage agreement and was not a signatory "related person" to the signatory operator that had signed such an agreement. See *Eastern Enterprises.*, 524 U.S. at 504 (plurality opinion); *id.* at 539 (opinion of Kennedy, J., concurring in the judgment and dissenting in part). The *Eastern Enterprises* decision is not directly relevant to this case, which involves only an issue of statutory construction.

c. To ensure that health-care benefits are paid for unassigned beneficiaries, each signatory operator or related person that has been assigned a beneficiary may be assessed an additional "unassigned beneficiaries premium" to be paid to the Combined Fund. 26 U.S.C. 9704(a). That premium represents each assigned operator's *pro rata* share of the total unmet benefit costs of unassigned beneficiaries. See 26 U.S.C. 9706(d) and (f). For example, if an operator was responsible for one percent of all assigned beneficiaries, it would also be responsible for one percent of the unmet benefit costs of all unassigned beneficiaries.

The Coal Act provided two other sources of financing for the health-care benefits of unassigned beneficiaries. Assigned operators may be required to pay an unassigned-beneficiary premium only if those two other sources prove insufficient to meet the benefit costs of unassigned beneficiaries.

First, the Act directed that $210 million be transferred from the 1950 United Mine Workers of America Pension Plan, a multi-employer plan that had been established to finance retirement (but not health-care) benefits of miners who had retired before 1976. A portion of those transfers was to be applied to reduce any unassigned-beneficiary premium liability for plan years commencing on or after October 1, 1993, while those funds remained available. See 26 U.S.C. 9705(a)(1) and (3)(B).

Second, for fiscal years beginning on or after October 1, 1995, the Coal Act authorizes transfers to the Combined Fund of interest earned on the Abandoned Mine Land Reclamation Fund (AML Fund) administered by the Department of the Interior. The Act specifies that those transferred monies are to be used to reduce the

unassigned-beneficiary premium liability. 26 U.S.C. 9705(b); 30 U.S.C. 1232(h).[4]

2. The first full fiscal year of Combined Fund operations (termed a "plan year" under the Act) was scheduled to begin on October 1, 1993. See 26 U.S.C. 9702(c).[5] Congress accordingly directed that premium payments to the Combined Fund were to commence during the plan year beginning on that date. See 26 U.S.C. 9704(g)(1). In accordance with that time frame, the Coal Act provides that "the Commissioner of Social Security shall, before October 1, 1993, assign each coal industry retiree who is an eligible beneficiary to a signatory operator." 26 U.S.C. 9706(a).

For several reasons, however, the Commissioner was unable to complete the assignments of all beneficiaries before October 1, 1993. First, the Coal Act itself did not authorize or appropriate any funds to carry out the assignment process, and the Social Security Administration (SSA) determined that it was not legally authorized to use Social Security trust funds for that purpose.[6] Congress eventually provided SSA with

[4] The AML Fund was established by the Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. 1201 *et seq.*, for the purpose of reclaiming and restoring land and water resources adversely affected by past coal mining. See 30 U.S.C. 1231(c). The AML Fund is financed by fees assessed on coal operators for each ton of coal produced. See 30 U.S.C. 1232(a).

[5] The Combined Fund actually commenced operations on February 1, 1993. See 26 U.S.C. 9702(a)(2), 9703(b)(4). Before October 1, 1993, benefits provided by the Combined Fund were financed through other means, including interim contributions from signatories to the 1988 national coal wage agreement and a $70 million transfer from a pension fund. See 26 U.S.C. 9704(i)(1)(A), 9705(a).

[6] See *Departments of Labor, Health and Human Services, Education, and Related Agencies Appropriations for 1994: Hearings Before a Subcomm. of the House Comm. on Appropriations*, 103d Cong., 1st Sess., Pt. 2, at 125-126, 158-159 (1993) (*House Appropriation Hearings*).

budgetary authority for its Coal Act functions in a supplemental appropriation act, which appropriated $10,000,000, "to remain available until expended," to enable SSA to make initial assignments, review assignments on requests for reconsideration, and calculate the initial health-benefit premium. That supplemental appropriations act, however, was not enacted until July 2, 1993, only three months before the date (October 1, 1993) on which the Combined Fund's operations were first financed through premiums from signatory operators. See Supplemental Appropriations Act of 1993, Pub. L. No. 103-50, Ch. V, 107 Stat. 254.[7]

Second, the assignment task proved to be enormously complicated and time-consuming. The Commissioner was responsible for assigning approximately 80,000 retired miners who were receiving benefits under the predecessor multi-employer benefit plans. Members of the Bituminous Coal Operators Association provided the agency with a list of coal operators who voluntarily acknowledged responsibility for approximately 15,000 of those retired miners. Although the Coal Act also required the Combined Fund to provide

[7] See also *Coal Industry Retiree Health Benefit Act of 1992: Hearing Before the Subcomm. On Oversight of the House Ways and Means Comm.*, 104th Cong., 1st Sess. 25 (1995) (statement of Deputy Commissioner Lawrence H. Thompson) (*1995 House Hearing*); Staff of House Comm. on Ways and Means, 103d Cong., 1st Sess., *Financing UMWA Coal Miner "Orphan Retiree" Health Benefits* 64-65 (Comm. Print 1993) (*Financing Orphan Benefits*); *Provisions Relating to the Health Benefits of Retired Coal Miners: Hearing Before the House Ways and Means Comm.*, 103d Cong., 1st Sess. 23 (1993) (statement of Acting Commissioner Lawrence H. Thompson) (*1993 House Coal Act Hearing*).

the Commissioner with the names and social security numbers of the retired miners who would be its beneficiaries (see 26 U.S.C. 9704(h)), those records were inadequate for completion of the assignment task. Thus, SSA was required to undertake a case-by-case evaluation of earnings records and employment history for some 65,000 individuals. Most of the social security employment records for those individuals were not computerized and had to be searched manually. In many cases, those records did not contain sufficient information to allow SSA to identify the signatory operator that was the miner's employer, or to determine whether any particular "related person" could be assigned responsibility for a miner if the original operator was defunct. The agency reviewed records of thousands of corporate transactions obtained from far-flung and disparate sources to determine whether retired miners could be assigned to related persons of signatory operators.[8]

---

[8] See J.A. 180-182; *1995 House Hearing* 24-25, 28-29 (statement of Deputy Commissioner Thompson); *1993 House Coal Act Hearing* 24 (statement of Acting Commissioner Thompson); *Financing Orphan Benefits* 64-65.

We have been informed by SSA that it completed all but about 10,000 of the initial assignments before October 1, 1993. The agency continued to make a further 2412 initial assignments between October 1, 1993, and February 24, 1994. (The record contains a figure of 2264 such initial assignments made in late 1993 and early 1994, see J.A. 182; the agency has since determined that 148 additional miners were assigned in that time.) Of those 2412 assignments, all but 15 were made in the month of October 1993; the remaining 15 were made in February 1994. About 7250 additional assignments were made at later stages, after the agency received more information about the identities of miners' employers and the employers' related persons.

Finally, operators requested administrative review of SSA's assignments in thousands of cases. As of 1998, SSA had reviewed assignments to 665 coal operators concerning 36,256 miners, out of the 80,000 retired miners who were beneficiaries of the Combined Fund. In a number of instances during that process of administrative review, SSA learned for the first time the proper identities of employers (or related persons) that had a higher priority under the assignment criteria then the operators to which the miners had been initially assigned, and that therefore should have been assigned the miners. Some of those newly identified operators (or related persons) had also employed miners who had previously been deemed unassigned because SSA was originally unable to identify any employer or related person still in business. That new information enabled SSA to assign previously unassigned miners to the newly discovered operators and related persons.[9]

3. Several signatory operators that received initial assignments of miners on or after October 1, 1993, raised judicial challenges to those assignments. They contended that the Commissioner had no authority to make any such assignments on or after October 1, 1993. In *Dixie Fuel Co.* v. *Commissioner of Social Security*, 171 F.3d 1052 (1999) (Pet. App. 27a-50a), the United States Court of Appeals for the Sixth Circuit agreed with those contentions. In these two consolidated cases now before this Court, the Sixth Circuit in turn relied

---

[9] See J.A.183; *Agency Management of the Implementation of the Coal Act, 1998: Hearing Before the Subcomm. on Oversight of Government, Management, Restructuring, and the District of Columbia of the Senate Governmental Affairs Comm.*, 105th Cong., 2d Sess. 60-61 (1998) (*1998 Senate Hearing*).

on its decision in *Dixie Fuel* to invalidate the assignments made to respondents on or after October 1, 1993. See Pet. App. 1a-4a.

In concluding in *Dixie Fuel* that the Commissioner had no authority to make assignments on or after October 1, 1993, the Sixth Circuit found it particularly significant that the Coal Act provided that the Commissioner "shall" make the assignments before October 1, 1993. The court stressed that "'shall' is explicitly mandatory language." 171 F.3d at 1061 (Pet. App. 43a) (internal quotation marks omitted).

The court acknowledged that Congress's use of the word "shall" to impose a duty on a government official to act by a certain date, "standing alone," is ordinarily insufficient to terminate the power of the government official to act beyond that date. See *Dixie Fuel*, 171 F.3d at 1062 (Pet. App. 44a). Nevertheless, it read the Coal Act's provisions governing the computation of unassigned-beneficiary premiums to rest on the premise that all assignments of beneficiaries must have been made before October 1, 1993. In particular, the court emphasized that each signatory operator's *pro rata* unassigned-beneficiary premium is determined by dividing the total number of beneficiaries assigned to that operator by the total number of beneficiaries assigned to all operators, "determined on the basis of assignments as of October 1, 1993." 26 U.S.C. 9704(f)(2); see *Dixie Fuel*, 171 F.3d at 1062 (Pet. App. 45a-47a). The court recognized that the Coal Act expressly provides that the quotient may be adjusted for subsequent plan years, to reflect possible changes in assignments after October 1, 1993—if, for example, operators successfully challenge assignments as having been made to the wrong signatory operator or related person. See 26 U.S.C. 9704(f)(1). But, the court reasoned, "those adjustments are all premised on the assignments' having been completed before October 1, 1993." 171 F.3d at 1063 (Pet. App. 47a).

4. In the two decisions at issue in this case, the Sixth Circuit invalidated assignments made by the Commissioner after October 1, 1993, on the authority of its decision in *Dixie Fuel*. Pet. App. 1a-2a, 3a-4a. In each case, respondents alleged that the Commissioner improperly assigned them responsibility for Combined Fund beneficiaries on or after October 1, 1993. In each case, the district court granted respondents summary judgment on that claim based on the Sixth Circuit's decision in *Dixie Fuel*. *Id.* at 7a-8a, 14a-25a.[10]

The Commissioner appealed in each case, and also petitioned for initial hearing en banc for the purpose of seeking reconsideration of *Dixie Fuel*. The court of appeals denied those petitions. Pet. App. 26a. The court then issued brief *per curiam* opinions affirming the district court's judgment in each case, explaining that the panel was bound to follow the circuit precedent in *Dixie Fuel*. *Id.* at 1a-2a, 3a-4a.

---

[10] The *Peabody* respondents' complaint set forth additional counts challenging the assignments on other grounds, but those other claims were all dismissed pursuant to a stipulation and by a separate order of the court. See Pet. App. 9a-13a. After all the claims raised in the complaint were resolved, the district court entered final judgment for the *Peabody* respondents pursuant to Federal Rule of Civil Procedure 58. *Id.* at 5a.

In *Bellaire*, the respondents also raised other challenges to the Commissioner's assignments, but after the district court ruled in respondents' favor on the *Dixie Fuel* claim, it directed entry of final judgment on that claim under Federal Rule of Civil Procedure 54(b). Pet. App. 12a-13a, 22a-24a. The district court also ordered injunctive relief in favor of the *Bellaire* respondents. *Id.* at 21a-22a.

SUMMARY OF ARGUMENT

The court of appeals erred in holding that Congress terminated the Commissioner's authority to assign Combined Fund beneficiaries to responsible signatory operators or related persons on October 1, 1993. This Court's precedents make clear that a statutory provision directing an agency to accomplish a task by a specified date is not, standing alone, to be construed to terminate the agency's power to continue implementing the statute after that date. Congress must instead clearly and unequivocally extinguish the agency's authority as a consequence for untimely action.

The Coal Act contains no such expression of congressional intent. The Act contains no provision that expressly terminates the Commissioner's power to make assignments to financially responsible entities under the statutory assignment criteria as of October 1, 1993, or expressly makes void any assignments made after that date. The court of appeals' conclusion that the Commissioner's authority expired on that date, moreover, is contrary to several of Congress's central purposes in enacting the Coal Act—to ensure that Combined Fund beneficiaries' health-care costs would be paid, to the extent possible, by the companies that employed them (or a related person to such a company), and to maintain the Combined Fund as a self-sufficient, privately-financed plan. The court of appeals' construction shifts the costs of financing retired miners' health-care benefits to the public fisc and, potentially, to other signatory operators that never employed the miners, even when the company that employed those retired miners remains in existence and is solvent.

Moreover, when an assignment of a beneficiary to a particular operator is overturned on administrative

review, the Coal Act expressly requires that that beneficiary be reassigned to another signatory operator or related person if possible, and that the operators' premiums be recalculated accordingly. In such circumstances, premiums are also recalculated for all operators back to October 1, 1993. There is no sound basis for permitting such reassignments and recalculations in that context, yet prohibiting reassignment and recalculation in the context of a determination that a beneficiary, mistakenly deemed unassigned at one point, should in fact have been assigned to an existing and solvent signatory operator.

Congress's subsequent enactment of a supplemental appropriation to allow the Commissioner to undertake her responsibilities under the Coal Act further supports the Commissioner's exercise of assignment authority after October 1, 1993. Congress knew, when it enacted that supplemental appropriation less than three months before October 1, 1993, that the agency had not even begun the process of making assignments (because the agency determined it had no statutory authorization to spend money to do so), and that the agency did not anticipate that the task could be completed by October 1, 1993. Congress nonetheless gave the agency authority to spend money to complete the task beyond that date. Congress would not have done so had it understood the Coal Act to terminate the Commissioner's authority to make assignments as of October 1, 1993.

To the extent the question remains in doubt after a review of the text, structure, and purposes of the Coal Act, the Court should defer to the Commissioner's determination that she had authority to complete the assignments after October 1, 1993. That determination is not contradicted by anything in the Act, it is con-

sistent with this Court's dictates admonishing against reading statutes as terminating agency authority based on expiration of time periods, and it is reasonable in light of the complex task facing the Commissioner when Congress provided her with the necessary funds.

ARGUMENT

THE COAL ACT DOES NOT EXTINGUISH THE COMMISSIONER OF SOCIAL SECURITY'S AUTHORITY TO MAKE BENEFICIARY ASSIGNMENTS AS OF OCTOBER 1, 1993

The decisions below, holding that the Commissioner of Social Security had no power to make any initial assignments of retired miners to signatory operators on or after October 1, 1993, fundamentally misconstrue the scope of the Commissioner's statutory authority to assign responsibility for Coal Act beneficiaries to the private parties that Congress deemed most responsible for their health-care benefits. Those decisions rest on the erroneous conclusion that Congress intended to divest the Commissioner of authority to apply the detailed assignment scheme set forth in the Coal Act just three months after Congress appropriated the funds necessary to permit the Commissioner to begin the complex and time-consuming process of assigning tens of thousands of beneficiaries. Moreover, they attribute to Congress an intent to extinguish the Commissioner's assignment power after an arbitrarily established date, even when the Commissioner is subsequently able to identify a responsible coal operator or related person meeting the statutory assignment criteria, and even when crucial assignment information was not and could not have been reasonably uncovered before the arbitrarily established date.

The proper understanding of the Commissioner's assignment authority is set forth in the Fourth Circuit's decision in *Holland* v. *Pardee Coal Co.*, 269 F.3d 424 (2001), petition for cert. pending, No. 01-1366. In that case, the Fourth Circuit explained that, under this Court's precedents, statutory provisions that direct an agency to take action before a specific time are generally not construed to remove the agency's authority to carry out the statutory objectives thereafter. *Id.* at 431. The Fourth Circuit also noted that the Coal Act is devoid of any indication that Congress intended to divest the Commissioner of authority to make assignments as of October 1, 1993, merely because the Commissioner was unable to accomplish the task by that date. *Id.* at 433. The Fourth Circuit therefore correctly concluded:

> [T]o construe § 9706(a) as jurisdictional[] * * * would do violence to Congress's goal of ensuring that funding obligations be allocated to specific coal operators according to their actual, individual liability. Such a result also frustrates congressional intent by shifting financial obligations properly borne by private parties to the public fisc.

Id. at 432.

As shown more fully below, the text, structure, and purposes of the Coal Act all demonstrate that the Fourth Circuit's reading of the Coal Act best effectuates Congress's intent, and that the Sixth Circuit's decisions under review here are incorrect and should be reversed.

A. The Text, Structure, And Purposes Of The Coal Act Show That The Commissioner Retained Authority To Make Initial Assignments Of Combined Fund Beneficiaries On Or After October 1, 1993

1. A Statutory Directive That An Agency Take Action By A Particular Date Is Ordinarily Not Read To Bar The Agency From Acting After That Date

This Court long ago made clear that "many statutory requisitions intended for the guide of officers in the conduct of business devolved upon them[] * * * do not limit their power or render its exercise in disregard of the requisitions ineffectual." *French* v. *Edwards*, 80 U.S. (13 Wall.) 506, 511 (1871). With specific regard to statutory provisions directing federal agencies to take action by or within a particular time, the Court has stressed that it is "most reluctant to conclude that every failure of an agency to observe a procedural requirement voids subsequent agency action, especially when important public rights are at stake." *Brock* v. *Pierce County*, 476 U.S. 253, 260 (1986). The Court has thus admonished that, "if a statute does not specify a consequence for [agency] noncompliance with statutory timing provisions, the federal courts will not in the ordinary course impose their own coercive sanction." *United States* v. *James Daniel Good Real Property*, 510 U.S. 43, 63 (1993); see also *United States* v. *Montalvo-Murillo*, 495 U.S. 711, 717-718 (1990); *Regions Hosp.* v. *Shalala*, 522 U.S. 448, 459 n.3 (1998).

Congress may desire prompt administrative action, and it may, as it did in the Coal Act, direct the agency to undertake tasks by a particular date. But even when Congress has in that way manifested its intent that timely administrative action is important, it does not

follow that the passing of the date by which Congress expected agency action to occur terminates the agency's power to implement the congressional design. Such a sanction for untimely administrative action, by depriving the agency of power to act, can thwart rather than advance Congress's objectives. This Court has therefore held that the mere fact that Congress has directed an agency to take action by a certain date ordinarily does *not* indicate a legislative intent to preclude the agency from acting thereafter. Rather, the statute must contain a clear and specific indication that Congress intended to deprive the agency of authority to act after a deadline has passed. See *James Daniel Good*, 510 U.S. at 63 (government's failure to adhere to statutory time requirements on administrative processing of a forfeiture case does not divest it of power to prosecute forfeiture action); *Montalvo-Murillo*, 495 U.S. at 718-719 (government's failure to comply with statutory requirement for immediate hearing on necessity of pretrial detention does not bar pretrial detention of a person who should otherwise be detained); *Brock* v. *Pierce County*, 476 U.S. 253, 260 (1986) (government's failure to meet statutory deadline on investigation of a complaint does not divest it of power to take enforcement action with respect to matters raised in the complaint).

2. Nothing In The Coal Act Suggests That Congress Intended To Bar The Commissioner From Making Assignments On Or After October 1, 1993

Nothing in the text, structure, or purposes of the Coal Act suggests that Congress terminated the Commissioner's assignment authority on October 1, 1993.

a. The statutory text is devoid of any provision expressly divesting the Commissioner of assignment power on or after October 1, 1993. Congress could have expressly provided that, if assignments were not completed by October 1, 1993, the Commissioner would have no further authority to assign a Coal Act beneficiary to a signatory operator or related person, and that any untimely assignments would be deemed invalid. Congress has, in fact, specifically provided in various statutes that an agency's authority to act terminates upon expiration of a certain period.[11] The Coal Act, however, contains no such provision. That omission is itself highly significant, for Congress enacted the Coal Act against the background of this Court's precedents, including *Pierce County* and *Montalvo-Murillo*, making clear that a statutory requirement that an agency take action by or within a certain time does not, by itself, divest the agency of authority or jurisdiction to act outside that time. Congress is presumed to have been aware that, under those decisions, a statutory provision that an agency "shall" take action by a certain date will not, without

[11] See, *e.g.*, 25 U.S.C. 2710(d)(8)(C) (proposed state-tribal compact must be deemed approved if Secretary of the Interior fails to disapprove compact within 45 days); 25 U.S.C. 2710(e) (proposed tribal gaming ordinance must be deemed approved if Secretary of the Interior fails to disapprove ordinance within 90 days); 42 U.S.C. 1396n(h) (1994 & Supp. V 1999) (application for waiver of Medicaid requirements must be deemed approved if Secretary of Health and Human Services does not issue a decision within 90 days); 49 U.S.C. 15901(c) (Supp. V 1999) (Surface Transportation Board investigative proceeding automatically dismissed if not completed within three years); see also 18 U.S.C. 3162(a)(1) and (2) (Speedy Trial Act of 1974, providing that if indictment is not filed or defendant is not brought to trial within specified periods, the charge or indictment "shall be dismissed").

more, be construed to terminate the agency's authority after that date. See *United States* v. *Wells*, 519 U.S. 482, 495 (1997).

Nor does the text of the Coal Act manifest any congressional intent to impose a "consequence" (*James Daniel Good*, 510 U.S. at 43, 63) on the Commissioner if she failed to make assignments by October 1, 1993. Indeed, visiting a consequence on the Commissioner in the context of the Coal Act would make little sense. Unlike other cases (such as *Pierce County*, *Montalvo-Murillo*, and *James Daniel Good*), where it was argued (unsuccessfully) that Congress wanted the agency to lose the authority to enforce a statutory provision as a sanction for missing deadlines, no meaningful sanction could be imposed on the Commissioner, who does not "enforce" the Coal Act against other parties. The Commissioner does not pay for the health-care benefits for beneficiaries under the Act; that is the function of the Combined Fund, which is a private entity not under the Commissioner's control. See 26 U.S.C. 9702(a)(1), 9703(b)(1). Similarly, the Combined Fund, not the Commissioner, pursues collection actions against assigned operators that do not pay their premiums. The agency's functions are limited to assigning beneficiaries to operators, reexamining those assignments on administrative review, and calculating the per-beneficiary premium that those operators must pay to the Combined Fund. See 26 U.S.C. 9704, 9706. Those assignments thus take place under a statutory framework that is designed to establish relationships among *private* parties to provide for the funding of health-care benefits.

Extinguishing the Commissioner's power to make assignments after October 1, 1993, would therefore visit adverse consequences, not on the agency responsible

for making the assignments, but on other parties that have no control over the timing of the Commissioner's assignment process. Under the Sixth Circuit's reading of the Coal Act, retired miners who were initially assigned to a signatory operator after October 1, 1993, would likely be deemed "unassigned." To finance their benefits, the Combined Fund would then have to look to transfers of interest from the Department of the Interior's AML Fund or, if such funds were not available, to a further *pro rata* contribution from all coal operators that had been assigned beneficiaries. See pp. 6-8, *supra*. No precedent of which we are aware supports visiting the consequences of an agency's failure to meet a time requirement onto other, innocent entities in such a fashion.

b. Construing the Coal Act to terminate the Commissioner's assignment power as of October 1, 1993, also would frustrate Congress's objective, set forth in the text of the Coal Act itself, of ensuring that the costs of providing health-care benefits are, to the extent possible, borne by the persons Congress deemed "most responsible for plan liabilities." Energy Policy Act of 1992, Pub. L. No. 102-486, § 19142(a)(2), 106 Stat. 3037. In establishing the three-tier assignment structure in Section 9706(a), Congress manifested its intent that miners should be deemed unassigned only as a last resort, when no employer (or related person) falling within the statutory criteria could be identified. As one of the chief sponsors of the Coal Act explained, the "overriding purpose" of the Act's assignment provisions was "to find and designate a specific obligor for as many

beneficiaries in the Plans as possible." 138 Cong. Rec. 34,002 (1992) (explanation by Sen. Wallop).[12]

The Sixth Circuit's reading of the Coal Act frustrates that central congressional objective. The Combined Fund is required by the Act to use all available plan resources to ensure, to the maximum extent feasible, that health benefits are substantially the same as those provided under the predecessor UMWA benefit trusts. See 26 U.S.C. 9703(b). Under the Sixth Circuit's decision, however, even a beneficiary whose former employer is demonstrably in business and solvent—and might well be paying for the health-care costs of other beneficiaries, if the Commissioner had identified that employer as the appropriate responsible person for

---

[12] In *Sigmon*, the Court rejected the government's submission that another aspect of Senator Wallop's statement demonstrated that a direct successor in interest of a signatory operator could be assigned responsibility for the health-care costs of the operator's retired employees, if the operator itself was no longer in business. See 122 S. Ct. at 953 n.13. The Court did not suggest, however, that Senator Wallop's statement was not probative of the proper interpretation of the Coal Act; rather, it concluded that his statement was consistent with the statutory text, which the Court read to preclude the government's proposed construction. See *ibid.* In this case, there is no clear statutory language to the effect that the Commissioner's authority to make assignments *terminated* as of October 1, 1993. At most, the text of the statute indicates that Congress, by using the word "shall," intended that the tasks be completed by that date. But as we explain in the text, the word "shall," by itself, does not indicate a congressional purpose to divest an agency of authority to act after the date referred to in the statute. See pp. 20-21, *supra*; see also *Pardee*, 269 F.3d at 433 ("The Coal Act, in short, is entirely devoid of any provision that expressly divests the SSA of its authority to make adjustments or additions to the assigned and unassigned beneficiary pools in light of changed circumstances or newly obtained information.").

those other beneficiaries before October 1, 1993—would remain in the unassigned-beneficiary pool. The cost of that beneficiary's health-care benefits would then be paid in the first instance from public monies transferred from an account administered by the Department of the Interior principally designated for other important programmatic purposes—namely, the amelioration of the serious adverse consequences of surface mining. See 26 U.S.C. 9705(b); 30 U.S.C. 1232(h).[13] If those transfers proved inadequate, the beneficiary's health-care costs would fall on other private parties with no employment connection to the beneficiary, through the imposition of an unassigned-beneficiary premium. 26 U.S.C. 9704(d). Consequently, rather than promote a privately funded program that places funding burdens on the private parties that Congress deemed most responsible, the Sixth Circuit's ruling would shift costs to the public and to industry participants with no connection to the beneficiaries in question.[14]

---

[13] See *Pardee*, 269 F.3d at 438 (noting that funds transferred from the AML Fund "represent funds diverted from the important public purpose of reclamation projects to rectify the serious threats posed to public health and safety by abandoned coal mines," and that "Congress could not and did not intend the AML Fund interest to be unnecessarily depleted on account of simple administrative delay by the SSA").

[14] Those costs, moreover, could be substantial. The General Accounting Office has estimated that nationwide invalidation of initial assignments made on or after October 1, 1993, could require the Combined Fund to make net refunds of $57 million in premium revenues collected for prior fiscal years. See General Accounting Office, *Analysis of the Administration's Proposal to Ensure Solvency of the United Mine Workers of America Combined Benefit Fund* 7 (Aug. 15, 2000) (lodged with the Clerk). In addition, the government estimates that the Combined Fund could lose more than $10 million annually in revenue from assigned-beneficiary premiums in future fiscal years. See Pet. 25-26 & nn. 18-19.

Congress expressly intended the Combined Fund to operate as a "privately financed self-sufficient program." Energy Policy Act of 1992, Pub. L. No. 102-486, § 19142(b)(3), 106 Stat. 3037. In establishing the Combined Fund, Congress rejected proposals that the government undertake the burden of financing retired miners' benefits. Rather, Congress made transfers of interest from the AML Fund available only as a back-up to ensure that "orphan" retirees whose employers (and all related persons) had gone out of business would not be deprived of their benefits. The assignments at issue in these cases, however, do not involve such "orphan" retirees. Rather, they involve miners who worked *for respondents* (or their related companies). By allowing respondents to shift responsibility for their retirees to the government, the Sixth Circuit's decisions contravene the "pay for your own" principle on which the Coal Act's assignment priority is based and undermines Congress's intent that the Combined Fund be financed, to the extent possible, from private sources. See *Pardee*, 269 F.3d at 437.[15]

---

[15] The *Peabody* respondents have argued (Br. in Opp. 7) that the fact that a particular beneficiary might be allocated to the wrong signatory, or incorrectly deemed unassigned, is of little significance, because Congress's "primary objective" in the Coal Act was only to ensure "the continued provision of health benefits to retired mine workers," and retired miners will continue to receive benefits even if those benefits are paid for by the wrong party. Congress well understood, however, that a principal reason for the collapse of the predecessor health-care trusts was that operators resented paying for the entire cost of the health-care benefits of retired miners who had never worked for them, or for any entity related to them. Faced with such costs, operators continued to withdraw from the NBCWA system, and the downward spiral of

c. The imposition of a short, inflexible jurisdictional deadline for assignment determinations would be particularly inconsistent with Congress's decision to include, within the ambit of parties potentially responsible for Combined Fund beneficiaries' health-care costs, not only the company that actually employed a retired miner, but also a broad range of entities that were "related" to a signatory of the pertinent collective bargaining agreement. The Coal Act provides that, if the signatory operator that employed a retired miner is no longer in business, a beneficiary may be assigned to a "related person," including, but not limited to, a member of a controlled group of corporations including the original signatory, a trade or business under common control with the signatory, or any successor in interest of one of those related persons. See 26 U.S.C. 9701(c)(2), 9706(a); see generally *Sigmon*, 122 S. Ct. at 948, 950-951.

That provision for "related person" responsibility made it necessary for the Commissioner in some cases to trace winding connections and chains of transition in business ownership and control to identify a responsible related party. For example, if the original signatory was defunct by the time the assignments were made, the Commissioner would have had to determine whether any other company had shared 50% common ownership with the signatory. That affiliate company might have subsequently been involved in a series of mergers with other companies over a period of several years. The Act nonetheless contemplates that the last

---

that system accelerated. See *Sigmon*, 122 S. Ct. at 947. Congress established the assignment criteria in the Coal Act precisely to avoid a recurrence of that problem.

entity in the chain should be deemed a "related person" and assigned responsibility for beneficiary premiums.

The application of a fixed and short jurisdictional limit on making such complex determinations is manifestly impracticable and would frustrate Congress's intent to impose financial responsibility on a broad range of "related parties" in instances in which the original signatory company could no longer be found. Information on corporate affiliations, mergers, and other changes in corporate ownership and control is not available from any one, central repository. It must instead be pieced together, on a case-by-case basis, from information gleaned from the Combined Fund, other signatory operators, state corporation records, and retired miners. It is highly unlikely that Congress would have imposed an inflexible deadline on determinations that must, in a significant number of cases, be made on the basis of information that was not within the Commissioner's control and that could not be quickly and easily obtained from other sources. See *Regions Hosp.*, 522 U.S. at 459 n.3 (missing a statutory deadline is "a not uncommon occurrence when heavy loads are thrust on administrators, [and] does not mean that [the] official lacked power to act beyond it").

It is no answer to assert, as respondents do (see Peabody Br. in Opp. 10), that the Coal Act does not require a perfect match between each retired coal miner and the signatory operator that actually employed that miner. Congress did recognize that the signatory operator that had employed the miner might no longer be in existence or might not have sufficient assets to pay for the miner's benefits. Congress made provision in such cases for the Commissioner and the Combined Fund to look to the signatory operator's "related persons." See 26 U.S.C. 9701(c)(2)(A), 9704(a).

But Congress did not intend that a signatory operator that had actually employed a beneficiary of the Combined Fund and was still in business and solvent should be able to force responsibility for its own employees onto other, unrelated operators or the AML Fund. To the contrary, that is exactly the kind of maneuver that precipitated the crisis in the predecessor health-care trusts for coal industry retirees, and that led Congress to enact the Coal Act.[16]

d. Other Coal Act provisions addressing the Commissioner's assignment power confirm that Congress intended the Commissioner to have continuing authority to make and modify initial assignment determinations in light of changed circumstances or newly uncovered information. In particular, the Coal Act provides that coal companies may seek administrative reconsideration of an initial beneficiary assignment. 26 U.S.C. 9706(f). Under that provision, if the Commissioner concludes that an initial assignment was made in error, she "shall notify the assigned operator and the trustees of the Combined Fund" (who shall reduce the premiums of that operator), see 26 U.S.C. 9706(f)(3)(A)(i), and "shall review the beneficiary's record for reassignment under subsection (a)" of Section 9706, see 26 U.S.C. 9706(f)(3)(A)(ii). That reassignment may occur, of course, after October 1, 1993. Thus, Section 9706(f)(3) makes clear that in at least some circumstances, the Commissioner may make a new assign-

[16] See *Pardee*, 269 F.3d at 437 ("It is apparent that a central objective of the Act is to assign retired coal miners and their dependents to their respective employers whenever such a match is possible, and to allocate liability accordingly. This legislative objective corresponds closely to the Act's genesis and policy underpinnings—and, crucially, to its funding scheme.").

ment of a beneficiary without regard to the putatively absolute deadline in Section 9706(a).

Respondents may argue that Section 9706(f)(3) is intended merely to carve out an exception to what they would assert is an otherwise absolute assignment deadline for instances in which an initial assignment is overturned on administrative appeal. The Act, however, is not drafted in a way that suggests the authority to make new assignments after an appeal is an "exception" to a general rule that assignments would otherwise be barred on or after October 1, 1993. To the contrary, Section 9706(f)(3)(A)(ii) states that, if the Commissioner determines on review that an assignment was in error, she "shall review the beneficiary's record for reassignment *under subsection (a)*," 26 U.S.C. 9706(f)(3)(A)(ii) (emphasis added), the provision of the Act that governs the assignment of beneficiaries "[i]n general," 26 U.S.C. 9706(a) (heading). That wording indicates that the Commissioner, in making a reassignment, would be invoking a power that is conferred by 26 U.S.C. 9706(a) itself to assign an eligible beneficiary on or after October 1, 1993—as before that date—when necessary to ensure that the assignment is made to the most responsible entity under the statutory scheme.

Furthermore, as the Fourth Circuit explained, if Congress had intended that the reassignment directive in Section 9706(f)(3)(A)(ii) to be a narrow exception to an otherwise absolute jurisdictional bar, it could have demonstrated such an intent by using any of several well-known and frequently employed conventions of statutory drafting. See *Pardee*, 269 F.3d at 435 n.14. Congress could, for example, have directed that the Commissioner must make all assignments by October 1, 1993, "except as provided" in the appeal provisions of 26

U.S.C. 9706(f). See, *e.g.*, *Acosta* v. *Louisiana Dep't of Health & Human Res.*, 478 U.S. 251, 254 (1986). Or, Congress could have provided that the Commissioner may make new assignments after an administrative appeal, "notwithstanding" the deadline set forth in 26 U.S.C. 9706(a). See, *e.g.*, *Cisneros* v. *Alpine Ridge Group*, 508 U.S. 10, 13 (1993). The text of the Coal Act, however, contains nothing to suggest that the reassignment power contemplated by Section 9706(f)(3) is an "exception" to an otherwise fixed jurisdictional deadline. To the contrary, the absence of any language purporting to reconcile the remedial powers set forth in the administrative appeal provisions of Section 9706(f)(3) with the putatively absolute "deadline" in Section 9706(a) indicates that Congress did not intend to impose a fixed jurisdictional deadline on assignments in the first instance, and so there was no conflict to reconcile.

Construing the remedial powers conferred by Section 9706(f)(3) as a narrow "exception" to an otherwise absolute deadline also would create strange and unsound distinctions in the Commissioner's power to reexamine initial administrative determinations. If an administrative appeal revealed that an initial assignment of a beneficiary to an entity was based on an error of fact or a misreading of the Act, the Commissioner would have authority under Section 9706(f)(3) to reassign that beneficiary to another entity, if such an entity falling within the statutory criteria could be identified. But under the Sixth Circuit's approach, the Commissioner would be powerless to make a proper assignment of a beneficiary who previously had been deemed unassigned, even if crucial information such as the signatory status of the beneficiary's employer or the identity of businesses related to the signatory was

not reasonably available to the Commissioner until after October 1, 1993. Such distinctions in the Commissioner's power to reconsider initial decisions in light of new information would serve no discernible purpose and should not be attributed to Congress absent a clear statutory command.

B. The Sixth Circuit's Reading Of The Coal Act's Provisions Governing The Calculation Of Unassigned-Beneficiary Premiums As Limiting The Commissioner's Assignment Authority Is Erroneous

Despite the clear import of the statutory text and purposes, the Sixth Circuit concluded in *Dixie Fuel* that Congress intended to extinguish the Commissioner's authority to make assignment determinations as of October 1, 1993. The Sixth Circuit reasoned principally that the Coal Act's provision governing the computation of assigned operators' *unassigned* beneficiary premiums is premised on a requirement that all assignment determinations must be made by October 1, 1993. Relying in particular on 26 U.S.C. 9704(f)(1), the Sixth Circuit concluded that "the calculation of the obligation of every assigned operator for payment of unassigned beneficiary premiums is dependent upon the completion of the assignment of beneficiaries by October 1, 1993." *Dixie Fuel*, 171 F.3d at 1063 (Pet. App. 47a.)

That reasoning is flawed in several respects. First, Section 9704(f) does not address the Commissioner's assignment responsibilities, and thus affords no basis for inferring any limitations on the Commissioner's authority to make assignments. Rather, Section 9704(f) deals with each assigned operator's proportionate share of *unassigned* beneficiary costs. The Commissioner's assignment authority is set forth in the separate

Section 9706(a), which, as we have explained, did not arbitrarily cut off, on October 1, 1993, the Commissioner's authority to ensure that responsibility for a Combined Fund beneficiary's health-care costs rests with the appropriate signatory operator. Even if Section 9704(f) might preclude an adjustment after October 1, 1993, to a signatory operator's unassigned-beneficiary premium based on adjustments in assignments, it would not follow that the Act barred the Commissioner from requiring that a signatory operator be responsible for a particular *assigned* beneficiary.

In any event, Section 9704(f) does not bar adjustments to unassigned beneficiary premiums after October 1, 1993, based on assignments made after that date. Section 9704(f)(1) provides:

> The term "applicable percentage" means, with respect to any assigned operator, the percentage determined by dividing the number of eligible beneficiaries assigned under section 9706 to such operator by the total number of eligible beneficiaries assigned under section 9706 to all such operators (determined on the basis of assignments as of October 1, 1993).

Section 9704(f)(1) defines each assigned operator's "applicable percentage" of the total number of assigned beneficiaries, and essentially requires each assigned operator to pay the proportion of the total health-care costs for all unassigned beneficiaries that is equal to its proportion of assigned beneficiaries. The Sixth Circuit reasoned in *Dixie Fuel* that, because Section 9704(f)(1) requires the "applicable percentage" to be determined on the basis of assignments "as of October 1, 1993," Congress must have required all assignments to be completed by that date.

The language of Section 9704(f)(1), however, admits of a different reading that is much more consistent with the statute as a whole. As the Sixth Circuit acknowledged (*Dixie Fuel*, 171 F.3d at 1062 (Pet. App. 46a)), Congress expressly *required* adjustments to be made to the "applicable percentage" in at least two defined circumstances—to reflect changes made to assignments based on the administrative appeal process (see 26 U.S.C. 9704(f)(2)(A)), and to take account of assigned operators that go out of business after October 1, 1993 (see 26 U.S.C. 9704(f)(2)(B)). The fact that Congress required such adjustments to be made in at least two circumstances does not suggest, however, that Congress *prohibited* adjustments in all other circumstances. Section 9704(f)(2) provides that the "applicable percentage for any assigned operator *shall* be redetermined" in those two cases. 26 U.S.C. 9704(f)(2) (emphasis added); see 26 U.S.C. 9704(f)(2)(A) (assignments "shall be modified" to reflect appeals); 26 U.S.C. 9704(f)(2)(B) (total number of assigned beneficiaries "shall be reduced" when operators go out of business). The Act does not, however, provide that adjustments "shall not" be made in any other circumstances. For example, although the Act does not expressly provide that such adjustments shall be made to reflect reassignments made if initial assignments are invalidated on judicial review, there is no evident reason why the Act should prohibit such adjustments.

In addition, when the Commissioner has reassigned beneficiaries from one operator to another based on an administrative or judicial determination that the initial assignment was in error, and each assigned operator's "applicable percentage" is changed as a result, the question has arisen whether Congress intended such changes to each assigned operator's "applicable per-

centage" to operate prospectively only, or whether such changes should relate back to the inception of premium-based financing of the Combined Fund on October 1, 1993. The Combined Fund has read Section 9704(f) to provide that such recalculations of each assigned operator's "applicable percentage" should relate back to October 1, 1993, when the proper assignment should have been made in the first place. In such cases, the adjustment will be deemed to have taken effect "as of" October 1, 1993, for the purpose of computing an operator's "applicable percentage" for a plan year.[17]

Nothing in the statutory scheme suggests that such adjustments in the assigned and unassigned beneficiary pools are unworkable or contrary to the overall statutory design. If beneficiaries must be reassigned from one operator to another, the Combined Fund can bill the new assignee and provide a refund or credit to the prior assignee. If beneficiaries are shifted between the assigned and unassigned beneficiary pools because of errors in the initial assignment determination, the Combined Fund can recalculate the unassigned-beneficiary obligations for any particular plan year and

[17] For example, when many of the Commissioner's initial assignments were vacated in light of this Court's decision in *Eastern Enterprises*, and numerous previously assigned beneficiaries were deemed unassigned as a result of that decision, the Combined Fund recalculated each assigned operator's "applicable percentage" of the total number of assigned beneficiaries, redetermined each assigned operator's unassigned-beneficiary premium based on that recalculation, and adjusted each operator's premiums back to October 1, 1993, as a result of that redetermination. The Commissioner has filed an amicus curiae brief expressing agreement with the Combined Fund's reading of Section 9704(f). See *Apogee Coal Co.* v. *Holland*, No. 98-C-2858-S (N.D. Ala. June 1, 2001), appeal pending, No. 01-13691 (11th Cir.) (argued Mar. 8, 2002).

make appropriate arrangements for refunds, credits, or requests for additional payments. Cf. 30 U.S.C. 1232(h)(4) (noting that AML transfers used to finance unassigned retiree benefits shall be adjusted in light of prior underpayment or overpayment). Indeed, the statute *requires* that adjustments be made in premium obligations if beneficiary assignments must be changed as a result of an appeal of an initial assignment determination or an assigned operator's cessation of business. See 26 U.S.C. 9704(f)(2), 9706(f)(3). Thus, the practicalities of administering the statute do not require that the number of assigned and unassigned beneficiaries be fixed in concrete as of October 1, 1993.[18]

Moreover, the October 1, 1993, date, serves another function: it marks the termination of the interim period in which the Combined Fund was financed through contributions from signatories to the 1988 NBCWA, and the commencement of the period in which the Fund is financed through premiums contributed by signatory operators that are assigned beneficiaries by the Commissioner. See 26 U.S.C. 9704(i)(1)(A); p. 8, note 5, *supra*. Such a date was necessary to ensure that a definite end was placed to payments by 1988 signatories that had no individual retirees in the Combined Fund

[18] The Act, moreover, expressly anticipates that the number of unassigned beneficiaries will change over time (and therefore an assigned operator's unassigned-beneficiary premium will change from year to year). Under Section 9704(d), an operator's unassigned-beneficiary premium is the applicable percentage of the product of the per-beneficiary premium for the plan year multiplied by "the number of eligible beneficiaries who are not assigned under section 9706 to any person *for such plan year*." 26 U.S.C. 9704(d) (emphasis added). Thus, annual changes in the amount that an assigned operator will owe to the Combined Fund are built into the statute itself.

beneficiary pool and thus had no long-term obligations against which those interim contributions could be credited (see 26 U.S.C. 9704(i)(1)(D)(i)). The October 1, 1993, date did not, however, terminate the authority of the Commissioner to assign beneficiaries of the Combined Fund to the signatory operator that had actually employed them.

C. Congress's Subsequent Enactment Of An Appropriations Law To Allow The Commissioner To Perform Her Responsibilities Under The Coal Act Shows That The Commissioner's Assignment Authority Did Not Terminate On October 1, 1993

Subsequent legislation appropriating funds to SSA to carry out the assignment process under the Coal Act demonstrates that Congress fully anticipated that the assignment process might well continue after October 1, 1993. A supplemental appropriation for SSA to undertake its responsibilities under the Coal Act was necessary because Congress had not made any such appropriation when it enacted the Coal Act, and SSA concluded that it could not use Social Security trust funds to carry out Coal Act responsibilities. SSA determined that the assignment process (as well as the process of determining the per-beneficiary premium, and undertaking any administrative reviews of appeals from the initial assignments) could not even begin until Congress enacted a supplemental appropriation. See pp. 8-9, *supra*. At a subcommittee hearing held on February 17, 1993, the Acting Commissioner explained the need for the supplemental appropriation. He stated further in a written submission to the subcommittee that "we have already passed the date to resolve all of these cases by October 1, 1993," and that, in light of the complexity of the assignment determinations and the

delay in receiving necessary funding, it was "unlikely that the assignment of all 85,000 coal miners can be completed by October 1, because some of these cases will require significant research to resolve."[19]

Congress therefore enacted a supplemental appropriation to allow SSA "to carry out sections 9704 and 9706" of title 26, which includes the initial-assignment responsibility set forth at Section 9706(a). See Supplemental Appropriations Act of 1993, Pub. L. No. 103-50, Ch. V, 107 Stat. 254. Congress did not pass the supplemental appropriations act until July 2, 1993, less than three months before the supposed jurisdictional deadline of October 1, 1993. See p. 9, *supra*. Yet Congress knew, when it enacted that appropriations act, that the initial assignment process had not even begun, and that the agency had told Congress that it could not finish the process of assigning the retired miners by October 1, 1993.[20] Congress accordingly made clear that it

---

[19] *House Appropriation Hearings* Pt. 2, at 125-126, 158-159 (statement and submission of Acting Commissioner Louis D. Enoff).

[20] Respondents have noted that, at a hearing held on September 9, 1993, after the supplemental appropriations measure was enacted, a different Acting Commissioner told a different committee that SSA expected to complete the initial assignment process before October 1, 1993. See Bellaire Br. in Opp. 12-13; *1993 House Coal Act Hearing* 26 (statement of Acting Commissioner Lawrence H. Thompson). Acting Commissioner Thompson may have been optimistic at that point about SSA's ability to complete the assignment process by the statutory date, but he was not making an enforceable commitment that the supposed deadline would be met for all initial assignments, and Congress had already enacted the supplemental appropriations measure after having been told by SSA that it could not complete all assignments by October 1, 1993, even if the agency began the process immediately. See p. 36, *supra*. Respondents also observe (Bellaire Br. in Opp.

intended the supplemental funds to be available to the agency to make assignments *after* October 1, 1993. Congress expressly provided that the supplemental appropriation would *not* expire at the end of the then-current fiscal year, which coincided with the Coal Act assignment "deadline," but would instead remain available "until expended."[21]

Congress's decision to make the supplemental funds available "until expended" is particularly significant. A supplemental appropriation is ordinarily subject to the purpose and time limitations, along with any other applicable restrictions of the appropriation being supplemented. See 2 General Accounting Office, *Principles of Federal Appropriations Law* 6-100 (2d ed. 1992). The unobligated balance of a supplemental appropriation therefore ordinarily expires at the end of the fiscal year in which it is passed, just as the unobligated balance of a regular annual appropriation measure expires at the end of the fiscal year for which it is enacted. *Ibid.* But when Congress provides that

13) that Mr. Thompson told a House subcommittee two years later that the agency had completed the process of making initial assignment decisions by October 1, 1993. But that comment was not made in the context of addressing whether the agency had power to make assignments after that date, and indeed Mr. Thompson also explained that SSA had had great difficulty in developing a list of assignable coal operators, and that "we continue to update the lists throughout the assignment process and the review process as we learn more about the companies." *1995 House Hearing* 23.

[21] See 107 Stat. 254. The fiscal year of the United States government begins on October 1 of each year and ends on September 30 of the following year. See 31 U.S.C. 1102. The 1993 federal fiscal year thus ended on September 30, 1993, the same date as the putatively absolute jurisdictional deadline on the Commissioner's assignment power under the Coal Act.

an appropriation shall remain available "until expended," the effect is that "all statutory time limits as to when the funds may be obligated and expended are removed." 1 General Accounting Office, *Principles of Federal Appropriations Law* 5-6 (2d ed. 1992).

In providing that the supplemental appropriations to carry out the Commissioner's tasks under the Coal Act would remain available "until expended," Congress expressed its understanding that the Commissioner could conduct those tasks, if necessary, beyond the then-current fiscal year, which ended on September 30, 1993. Congress would not have made that appropriation available beyond September 30, 1993, if it had believed that the Coal Act imposed an independent jurisdictional limitation on the Commissioner's power to make assignments after that date. Cf. *TVA* v. *Hill*, 437 U.S. 153, 190 (1978) ("When voting on appropriations measures, legislators are entitled to operate under the assumption that the funds will be devoted to purposes which are lawful and not for any purpose forbidden.").[22]

D. The Commissioner's Construction Of Her Authority To Make Assignments On Or After October 1, 1993, Is Entitled To Deference

Finally, to the extent the Coal Act may be ambiguous on the question, the Commissioner's construction of the Act as providing her with authority to continue, if necessary, the assignment process after October 1,

[22] The supplemental appropriations act also provided authorization for the agency to undertake other specific tasks under the Coal Act, such as conducting administrative reviews of appeals from initial assignment decisions. See p. 9, *supra*. The supplemental measure did not, however, suggest that the agency's authority to expend funds for Coal Act functions after October 1, 1993, was limited to any one of the specified duties.

1993, is entitled to deference. Cf. *National Cable & Telecomm. Ass'n* v. *Gulf Power Co.* 122 S. Ct. 782, 790 (2002). The Commissioner's conclusion that she retains assignment powers after October 1, 1993, is certainly not contradicted by anything in the statutory text; it furthers the Coal Act's objectives; and it is consistent with background principles set forth in decisions of this Court.

The Commissioner's application of the Coal Act also reflects the agency's practical experience in carrying out the enormously complex assignment tasks that the Act requires. That application was undertaken, moreover, in the context of exercising the power Congress conferred on the Commissioner to make binding assignment determinations that, unless set aside on judicial review, have the force and effect of law. See *Barnhart* v. *Walton*, No. 00-1937 (Mar. 27, 2002), slip op. 9-10; *United States* v. *Mead Corp.*, 121 S. Ct. 2164, 2171-2174 (2001); *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-843 (1984). For all those reasons, the Court, if it finds the Act ambiguous, should defer to the Commissioner's interpretation and sustain her determination that she had authority under the Coal Act to make assignments of beneficiaries after October 1, 1993.

CONCLUSION

The judgments of the court of appeals should be reversed.

Respectfully submitted.

THEODORE B. OLSON
Solicitor General

ROBERT D. MCCALLUM, JR.
Assistant Attorney General

EDWIN S. KNEEDLER
Deputy Solicitor General

PAUL R.Q. WOLFSON
Assistant to the Solicitor General

WILLIAM KANTER
JEFFREY CLAIR
Attorneys

APRIL 2002

APPENDIX

1. Section 9704 of Title 26, United States Code, provides in pertinent part:

§ 9704. Liability of assigned operators

(a) Annual premiums

Each assigned operator shall pay to the Combined Fund for each plan year beginning on or after February 1, 1993, an annual premium equal to the sum of the following three premiums—

(1) the health benefit premium determined under subsection (b) for such plan year, plus

(2) the death benefit premium determined under subsection (c) for such plan year, plus

(3) the unassigned beneficiaries premium determined under subsection (d) for such plan year.

Any related person with respect to an assigned operator shall be jointly and severally liable for any premium required to be paid by such operator.

(b) Health benefit premium

For purposes of this chapter—

(1) In general

The health benefit premium for any plan year for any assigned operator shall be an amount equal to the product of the per beneficiary premium for the plan year multiplied by the number of eligible bene-

ficiaries assigned to such operator under section 9706.

(2) Per beneficiary premium

The Commissioner of Social Security shall calculate a per beneficiary premium for each plan year beginning on or after February 1, 1993 * * *.

* * * * *

(d) Unassigned beneficiaries premium

The unassigned beneficiaries premium for any plan year for any assigned operator shall be equal to the applicable percentage of the product of the per beneficiary premium for the plan year multiplied by the number of eligible beneficiaries who are not assigned under section 9706 to any person for such plan year.

* * * * *

(f) Applicable percentage

For purposes of this section—

(1) In general

The term "applicable percentage" means, with respect to any assigned operator, the percentage determined by dividing the number of eligible beneficiaries assigned under section 9706 to such operator by the total number of eligible beneficiaries assigned under section 9706 to all such operators (determined on the basis of assignments as of October 1, 1993).

(2) Annual adjustments

In the case of any plan year beginning on or after October 1, 1994, the applicable percentage for any assigned operator shall be redetermined under paragraph (1) by making the following changes to the assignments as of October 1, 1993:

(A) Such assignments shall be modified to reflect any changes during the period beginning October 1, 1993, and ending on the last day of the preceding plan year pursuant to the appeals process under section 9706(f).

(B) The total number of assigned eligible beneficiaries shall be reduced by the eligible beneficiaries of assigned operators which (and all related persons with respect to which) had ceased business (within the meaning of section 9701(c)(6)) during the period described in subparagraph (A).

2. Section 9706 of Title 26, United States Code, provides, in pertinent part:

§ 9706. Assignment of eligible beneficiaries

(a) In general

For purposes of this chapter, the Commissioner of Social Security shall, before October 1, 1993, assign each coal industry retiree who is an eligible beneficiary to a signatory operator which (or any related person with respect to which) remains in business in the following order:

(1) First, to the signatory operator which—

(A) was a signatory to the 1978 coal wage agreement or any subsequent coal wage agreement, and

(B) was the most recent signatory operator to employ the coal industry retiree in the coal industry for at least 2 years.

(2) Second, if the retiree is not assigned under paragraph (1), to the signatory operator which—

(A) was a signatory to the 1978 coal wage agreement or any subsequent coal wage agreement, and

(B) was the most recent signatory operator to employ the coal industry retiree in the coal industry.

(3) Third, if the retiree is not assigned under paragraph (1) or (2), to the signatory operator which employed the coal industry retiree in the coal industry for a longer period of time than any other signatory operator prior to the effective date of the 1978 coal wage agreement.

* * * * *

(f) Reconsideration by Commissioner

(1) In general

Any assigned operator receiving a notice under subsection (e)(2) with respect to an eligible beneficiary may, within 30 days of receipt of such notice, request from the Commissioner of Social Security detailed information as to the work history of the beneficiary and the basis of the assignment.

(2) Review

An assigned operator may, within 30 days of receipt of the information under paragraph (1), request review of the assignment. The Commissioner of Social Security shall conduct such review if the Commissioner finds the operator provided evidence with the request constituting a prima facie case of error.

(3) Results of review

(A) Error

If the Commissioner of Social Security determines under a review under paragraph (2) that an assignment was in error—

(i) the Commissioner shall notify the assigned operator and the trustees of the Combined Fund and the trustees shall reduce the premiums of the operator under section 9704 by (or if there are no such premiums, repay) all premiums paid under section 9704 with respect to the eligible beneficiary, and

(ii) the Commissioner shall review the beneficiary's record for reassignment under subsection (a).

* * * * *

No. 01-705, 01-715

Supreme Court, U.S.
FILED
APR 8 2002
OFFICE OF THE CLERK

In the Supreme Court of the United States

JO ANNE B. BARNHART, Commissioner of Social Security,
Petitioner,

v.

PEABODY COAL COMPANY, *et al.*

MICHAEL H. HOLLAND, *et al.*, as Trustees of the United Mine Workers of America Combined Benefit Fund,
Petitioners,

v.

BELLAIRE CORPORATION, *et al.*

On Writs of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF FOR PETITIONERS THE TRUSTEES OF THE UMWA COMBINED BENEFIT FUND

JOHN R. MOONEY
ELIZABETH A. SAINDON
MOONEY, GREEN, BAKER, & SAINDON, P.C.
1920 L Street, N.W., Suite 400
Washington, D.C. 20036
(202) 783-0010

DAVID W. ALLEN
JONATHAN SOKOLOW
Office of the General Counsel
UMWA HEALTH & RETIREMENT FUNDS
2121 K Street, N.W.
Washington, D.C. 20037
(202) 521-2220

PETER BUSCEMI
Counsel of Record
ANNE BRAFFORD
MORGAN, LEWIS & BOCKIUS LLP
1111 Pennsylvania Avenue, N.W.
Washington, D.C. 20036
(202) 739-5190

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

QUESTION PRESENTED

In the Coal Industry Retiree Health Benefit Act of 1992, 26 U.S.C. §§ 9701–9722 and 30 U.S.C. § 1232(h), Congress directed the Social Security Administration to assign each of the retired coal miners and their dependents who are beneficiaries of the United Mine Workers of America Combined Benefit Fund to a specific coal operator or related company in accordance with the statutory criteria set forth in Section 9706. The Act provided that the beneficiary assignments "shall" be made before October 1, 1993. SSA completed most, but not all, of the initial assignments by that date.

The question presented is whether SSA retained authority to make initial assignments of Combined Fund beneficiaries after September 30, 1993.

PARTIES TO THE PROCEEDINGS

In addition to the parties named in the caption, the following persons were parties in the court of appeals: Larry G. Massanari, Acting Commissioner of Social Security; William P. Hobgood, Marty D. Hudson, Thomas O.S. Rand, Elliot A. Segal, Carl E. Van Horn, and Gail R. Wilensky, as Trustees of the United Mine Workers of America Combined Benefit Fund; and Eastern Associated Coal Company, NACCO Industries, Inc., and North American Coal Corporation.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

PARTIES TO THE PROCEEDINGS ii

TABLE OF AUTHORITIES v

OPINIONS BELOW 1

JURISDICTION 2

STATUTORY PROVISIONS INVOLVED 2

STATEMENT OF THE CASE 2

I. HISTORY OF THE COAL ACT 5

II. STRUCTURE OF THE COAL ACT 10

A. Eligibility For Benefits And Liability Structure 10

B. The Coal Act's Timetable And Interim Funding Scheme 11

C. Funding Benefits For "Orphans" 13

D. Obstacles to SSA's Assignment Process 15

III. PROCEEDINGS BELOW 16

SUMMARY OF THE ARGUMENT 19

ARGUMENT 23

I. THE DECISIONS BELOW CONFLICT WITH THIS COURT'S PRECEDENTS REGARDING THE EFFECT OF A GOVERNMENT AGENCY'S NON-COMPLIANCE WITH A STATUTORY DATE. 23

II. NOTHING IN THE COAL ACT REFLECTS A CONGRESSIONAL INTENT THAT SSA LOSE JURISDICTION TO MAKE INITIAL ASSIGNMENTS ON OCTOBER 1, 1993 AND THAT BENEFICIARIES NOT YET ASSIGNED ON THAT DATE BE DESIGNATED AS FOREVER UNASSIGNED. 30

III. OTHER INDICIA OF CONGRESSIONAL INTENT CONFIRM THAT SSA RETAINED AUTHORITY TO MAKE ORIGINAL ASSIGNMENTS AFTER THE STATUTORY DATE..... 41

IV. DEFERENCE IS DUE TO SSA'S INTERPRETATION OF "UNASSIGNED BENEFICIARIES" TO INCLUDE ONLY COMBINED FUND ORPHANS 47

CONCLUSION. 50

TABLE OF AUTHORITIES

Page

CASES

Anderson v. Yungkau,
329 U.S. 482 (1947) 27
Association of Bituminous Contractors, Inc. v. Apfel, 156 F.3d 1246 (D.C. Cir. 1998) 48
Barnhart v. Sigmon Coal Co., Inc.,
534 U.S. __, 122 S. Ct. 941 (2002) ..... *passim*
Bellaire Corp. v. Shalala,
995 F. Supp. 125 (D.D.C. 1997) 3,4
Brock v. Pierce County,
476 U.S. 253 (1986) ..... *passim*
Brotherhood of Ry. Carmen Div., Transp. Communications Intern. Union v. Pena,
64 F.3d 702 (D.C. Cir. 1995) 27
Brown v. Duchesne,
60 U.S. 183 (1856) 26
Brown v. Gardner,
513 U.S. 115 (1994) 34,36,41
Chevron v. Natural Resources Defense Council,
467 U.S. 837 (1984) 31,48
Comm'r of Internal Revenue v. Lundy,
516 U.S. 235 (1996) 36
Davis v. Michigan Dep't of Treasury,
489 U.S. 803 (1989) 31
Department of Commerce v. United States House of Representatives, 525 U.S. 316 (1999)..... 5-6
Dixie Fuel Co. v. Commissioner of Social Security,
171 F.3d 1052 (6th Cir. 1999)..... *passim*
Dixie Fuel Co. v. Callahan,
Civ. No. 97-373 (E.D. Ky. Jan. 7, 1999)..... 18
Eastern Enterprises v. Apfel,
524 U.S. 498 (1998) ..... *passim*

Edelman v. Lynchburg College,
122 S. Ct. 1145 (2002) 34
Edwards v. Aguillard,
482 U.S. 578 (1987) 6,33
Fort Worth Nat'l Corp. v. FSLIC,
469 F.2d 47 (5th Cir. 1972) 26
French v. Edwards,
80 U.S. (13 Wall.) 506 (1871) 25,26
General Motors Corp. v. United States,
496 U.S. 530 (1990) 25,37
Gottlieb v. Pena,
41 F.3d 730 (D.C. Cir. 1994) 27,37
Hendrickson v. FDIC,
113 F.3d 98 (7th Cir. 1997) 26
Hewitt v. Helms,
459 U.S. 460 (1983) 27
Holland v. Pardee Coal Co., Inc.,
269 F.3d 424 (4th Cir. 2001), *cert. pending*,
No. 01-1366 (docketed Mar. 18, 2002) ..... *passim*
Idaho Farm Bureau Fed'n v. Babbitt,
58 F.3d 1392 (9th Cir. 1996) 26
In re Blue Diamond Coal Co. (Blue Diamond Coal Co. v. Shalala), 79 F.3d 516 (6th Cir. 1996), *cert. denied*, 519 U.S. 1055 (1997) 5
In re Siggers,
132 F.3d 333 (6th Cir. 1997) 25,26
Kelso v. United States Dep't of State,
13 F. Supp. 2d 12 (D.D.C. 1998) 24
King v. St. Vincent's Hosp.,
502 U.S. 215 (1991) 32
Kinion v. United States,
8 F.3d 639 (8th Cir. 1993) 26
Lindsey Coal Mining Co. v. Chater,
90 F.3d 688 (3d Cir. 1996) 5

Marshall Durbin Food Corp. v. I.C.C.,
959 F.2d 915 (11th Cir. 1992) 27
McNary v. Haitian Refugee Center, Inc.,
498 U.S. 479 (1991) 27
NationsBank of N.C. v. Variable Annuity Life Ins. Co., 513 U.S. 251 (1995) 48
Oy v. United States,
61 F.3d 866 (Fed. Cir. 1995) 32
Pension Benefit Guaranty Corp. v. LTV Corp.,
496 U.S. 633 (1990) 48
Regions Hospital v. Shalala,
522 U.S. 448 (1998) 25,30
Shell Oil Co. v. Iowa Dep't of Revenue,
488 U.S. 19 (1988) 32
Societe Nationale Industrielle Aerospatiale v. United States Dist. Court,482 U.S. 522 (1987) 27
Southwestern Pa. Growth Alliance v. Browner,
121 F.3d 106 (3d Cir. 1997) 26
St. Regis Mohawk Tribe v. Brock,
769 F.2d 37 (2d Cir. 1985), *cert. denied*,
476 U.S. 1140 (1986) 30
Twin Pines Coal Co. v. United States Dep't of Labor,
854 F.2d 1212 (10th Cir. 1988) 26
United States v. Boccanfuso,
882 F.2d 666 (2d Cir. 1989) 26
United States v. General Motors Corp.,
876 F.2d 1060 (1st Cir. 1989) 26
United States v. James Daniel Good Real Property,
510 U.S. 43 (1993) ..... *passim*
United States v. Mead Corp.,
121 S. Ct. 2164 (2001) 48
United States v. Monsanto,
491 U.S. 600 (1989) 27
United States v. Montalvo-Murillo,
495 U.S. 711 (1990) 19,25,45

United States v. Nashville, C. & L. Ry. Co.,
118 U.S. 120 (1886) 20,26
Unity Real Estate Co. v. Holland,
178 F.3d 649 (3d Cir. 1999), *cert. denied*,
528 U.S. 963 (1999) 5
University of Texas v. Camenisch,
451 U.S. 390 (1981) 18
Young v. United States,
535 U.S. __, 122 S. Ct. 1036 (2002) 27

STATUTES

11 Fed. Reg. 5593 (1946) 6
20 C.F.R. §§ 422.601-607 38
20 C.F.R. § 422.606(f) 38
20 C.F.R. § 422.607 38
26 U.S.C. § 9701 ..... *passim*
26 U.S.C. § 9702 3,12,36
26 U.S.C. § 9703 10,12
26 U.S.C. § 9704 ..... *passim*
26 U.S.C. § 9705 ..... *passim*
26 U.S.C. § 9706 ..... *passim*
28 U.S.C. § 1254 2
28 U.S.C. § 1292 18
29 U.S.C. § 1002(1) 3
30 U.S.C. § 1232 ..... *passim*

Coal Industry Retiree Health Benefit Act of 1992,
26 U.S.C. §§ 9701 - 9722 ..... *passim*
Employee Retirement Income Security Act of 1974,
29 U.S.C. § 1002 3
Energy Policy Act of 1992,
Pub. L. No. 102-486, 106 Stat. 2776, 3036-56 10
Labor Management Relations Act,
29 U.S.C. § 186 3
Surface Mining Control and Reclamation Act of 1977,
30 U.S.C. §§ 1231-1233 13

Supplemental Appropriations Act of 1993,
Pub. L. No. 103-50, 1993 U.S.C.C.A.N
(107 Stat.) 254. 15,44

OTHER AUTHORITIES

138 Cong. Rec. 5,325-35 (1992) 9
138 Cong. Rec. 20,118 (1992) 43,44,45
138 Cong. Rec. 20,120 (1992) 11,44
138 Cong. Rec. 34,001-04 (1992) ..... *passim*

HOUSE COMMITTEE ON WAYS AND MEANS, 103D CONG., 1ST SESS., FINANCING UMWA COAL MINER "ORPHAN RETIREE" HEALTH BENEFITS (Comm. Print 1993) ..... *passim*

CONGRESSIONAL RESEARCH SERVICE REPORT FOR CONGRESS, 102D CONG., 2D SESS., COAL INDUSTRY: USE OF ABANDONED MINE RECLAMATION FUND MONIES FOR UMWA "ORPHAN RETIREE" HEALTH BENEFITS, *reprinted in* 138 Cong. Rec. 34,004-11 (1992) *passim*

THE SECRETARY OF LABOR'S ADVISORY COMMISSION ON UNITED MINE WORKERS OF AMERICA RETIREE HEALTH BENEFITS, COAL COMMISSION REPORT: A REPORT TO THE SECRETARY OF LABOR AND THE AMERICAN PEOPLE (1990) ..... *passim*

NORMAN J. SINGER, SUTHERLAND ON STATUTES AND STATUTORY CONSTRUCTION
(6th ed. 2001) 25-26, 32

In the Supreme Court of the United States

No. 01-705

JO ANNE B. BARNHART, Commissioner of Social Security,
Petitioner,

v.

PEABODY COAL COMPANY, *et al.*

No. 01-715

MICHAEL H. HOLLAND, *et al.*, as Trustees of the United Mine Workers of America Combined Benefit Fund,
Petitioners,

v.

BELLAIRE CORPORATION, *et al.*

On Writs of Certiorari to the United States Court of Appeals for the Sixth Circuit

---

BRIEF FOR PETITIONERS THE TRUSTEES OF THE UMWA COMBINED BENEFIT FUND

OPINIONS BELOW

The opinions of the court of appeals (01-705 Pet. App. 1a-4a) are not officially reported. The opinion and order of the district court in *Bellaire* (*id.* at 14a–25a) are not reported. The order of the district court in *Peabody* (*id.* at 7a–8a) is not reported.

JURISDICTION

The judgments of the court of appeals were entered on June 21, 2001 in *Peabody* and June 22, 2001 in *Bellaire*. On September 10, 2001, Justice Stevens extended the time within which the Trustees could file a petition for a writ of certiorari in *Bellaire* to and including October 22, 2001. On September 12, 2001, Justice Stevens extended the time within which the Commissioner could file a petition for a writ of certiorari to and including October 19, 2001 in *Peabody* and October 20, 2001 in *Bellaire*. On October 10, 2001 Justice Stevens further extended the Commissioner's time for petitioning to and including November 18, 2001 in *Peabody* and November 19, 2001 in *Bellaire*. On October 15, 2001, Justice Stevens further extended the Trustees' time for petitioning in *Bellaire* to and including November 19, 2001. The Commissioner's petition in the two cases, and the Trustees' petition in *Bellaire*, were filed on November 19, 2001 (a Monday). The petitions were granted and the cases consolidated on January 22, 2002. This Court's jurisdiction rests on 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

This case concerns the Coal Industry Retiree Health Benefit Act of 1992 (the "Coal Act"), 26 U.S.C. §§ 9701–9722 and 30 U.S.C. § 1232(h), which is reproduced in 01-715 Pet. App. 16a-51a.

STATEMENT OF THE CASE

The Coal Act established a statutory system for providing retiree health benefits to more than 100,000 beneficiaries, including retired coal miners represented by the United Mine Workers of America ("UMWA") and their survivors and dependents. Petitioners in No. 01-715 are the Trustees of the United Mine Workers of America Combined Benefit Fund ("Combined Fund"), which is one of two statutory trust funds created under the Coal Act. *See* 26

U.S.C. § 9702(a). The Combined Fund is a multiemployer employee welfare benefit plan within the meaning of the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1002(1), (37), and an employee trust fund within the meaning of the Labor Management Relations Act, 29 U.S.C. § 186(c)(5).

Section 9706(a) of the Coal Act provides that the Social Security Administration ("SSA"), using a statutory set of priorities, "shall, before October 1, 1993" assign each Combined Fund beneficiary to a specific coal operator that had signed a "coal wage agreement" (or to a "related person" of such a signatory). 26 U.S.C. § 9706(a). SSA assigned certain Combined Fund beneficiaries to respondent Bellaire Corporation ("Bellaire"), and as a result Bellaire became liable to pay annual health care premiums to the Combined Fund to finance the health care of the assigned beneficiaries. 26 U.S.C. § 9704(a). Respondents NACCO Industries, Inc. and North American Coal Corp., two companies that are "related" to Bellaire under the statutory definition in 26 U.S.C. § 9701(c)(2)(A), are jointly and severally liable for Bellaire's premiums. *See* 26 U.S.C. § 9704(a).

Almost immediately after enactment of the Coal Act, Bellaire challenged the constitutionality of the statute as applied to Bellaire and its related persons. *Bellaire Corp. v. Shalala*, 995 F. Supp. 125 (D.D.C. 1997) (complaint filed Jan. 29, 1993). Bellaire argued that Congress committed an unconstitutional taking or acted arbitrarily and irrationally in violation of due process by requiring it to pay annual premiums to finance health benefits for Bellaire's former employees and their eligible dependents.

Before enactment of the Coal Act, Bellaire's participation in the collectively bargained UMWA multiemployer health care system spanned at least four decades. During this period, Bellaire was a signatory to, among other agreements, the National Bituminous Coal

Wage Agreements of 1974, 1978, 1981, and 1984. *Id.* at 130.[1/] Each of these collective bargaining agreements, discussed in more detail below, explicitly referred to lifetime retiree health benefits and the retention of a health services card until death. Moreover, beginning in 1978, each NBCWA obligated signatory coal operators to continue making contributions to the relevant trust funds for as long as the NBCWAs required, regardless of whether the operators actually signed any subsequent NBCWA. *Id.* at 128. Bellaire nevertheless ceased contributions to the UMWA trust funds and discontinued its individual employer health plan. *Id.* at 131. Bellaire thus left its post-1975 retirees to receive health coverage from a multiemployer system to which Bellaire no longer contributed.

Having participated in creating coal miners' legitimate expectations of lifetime health benefits and in bringing about the funding crisis that afflicted the UMWA Funds before enactment of the Coal Act, Bellaire was in a poor position to challenge the validity of Congress's remedial legislation. Bellaire's constitutional attack failed, and it sought no further review.

Now, in this action, Bellaire seeks to reduce substantially its liability under the Coal Act. It argues that SSA lacked authority to make any initial assignments of Combined Fund beneficiaries after September 30, 1993, and that, therefore, SSA's assignments of 270 Combined Fund beneficiaries to Bellaire after that date were automatically invalid. Relying on the court of appeals' prior ruling in *Dixie*

1/ Some coal operators executed so-called "me too" agreements with the UMWA in which they agreed to abide by the terms of the NBCWA. *Bellaire*, 995 F. Supp. 128 n.2. Bellaire was a "me too" signatory to the 1981 and 1984 NBCWAs and signed two extension agreements that obligated it to provide health benefits to its own retirees until January 20, 1990. *Id.* at 130.

Fuel Co. v. Commissioner of Social Security, 171 F.3d 1052 (6th Cir. 1999), the district court ruled in Bellaire's favor and entered final judgment on this count of the complaint. 01-715 Pet. App. 3a–14a. SSA and the Trustees of the Combined Fund, recognizing that *Dixie Fuel* would bind a subsequent panel in the Sixth Circuit, asked the court of appeals to hear their appeal *en banc*. The court of appeals denied the request, and a subsequent panel affirmed the district court's decision on the basis of *Dixie Fuel*. *Id.* at 1a – 2a, 15a.

I. HISTORY OF THE COAL ACT

The history of the events leading to enactment of the Coal Act has been reviewed at length by various courts, including this Court. *Barnhart v. Sigmon Coal Co., Inc.*, 534 U.S. __, 122 S. Ct. 941, 946-48 (2002); *Eastern Enterprises v. Apfel*, 524 U.S. 498, 504-11 (1998) (plurality opinion);[2/] *Holland v. Pardee Coal Co.*, 269 F.3d 424, 427-29 (4th Cir. 2001), *cert. pending*, No. 01-1366 (docketed Mar. 18, 2002); *Unity Real Estate Co. v. Holland*, 178 F.3d 649, 653-54 (3d Cir.), *cert. denied*, 528 U.S. 963 (1999); *In re Blue Diamond Coal Co.* (*Blue Diamond Coal Co. v. Shalala*), 79 F.3d 516 (6th Cir. 1996), *cert. denied*, 519 U.S. 1055 (1997); *Lindsey Coal Mining Co. v. Chater*, 90 F.3d 688 (3d Cir. 1996); *see also* Report of the Secretary of Labor's Advisory Commission on United Mine Workers of America Retiree Health Benefits (Nov. 5, 1990) ("*Coal Comm'n Report*"). Accordingly, we summarize here only briefly the relevant factual background and the essential features of the Coal Act related to Bellaire's liability.[3/]

2/ Unless otherwise indicated, subsequent citations to *Eastern* refer to the plurality opinion.

3/ *See Department of Commerce v. United States House of Representatives*, 525 U.S. 316, 335 (1999) (understanding Act's

The coal industry and health care for retired coal miners have been subject to extensive government intervention and regulation for more than 50 years. In 1946, a breakdown in negotiations between the UMWA and coal companies about medical services for miners prompted a nationwide strike. *Eastern*, 524 U.S. at 504-05. The federal government declared a national emergency, seized the nation's coal mines, and conducted its own negotiations with the UMWA in an effort to resolve the dispute. *Id.;* 11 Fed. Reg. 5593 (1946). The negotiations produced the historic Krug-Lewis Agreement between the federal government and the UMWA that ended the strike and created the UMWA Health and Retirement Funds.[4/] Since then, retiree health benefits have been provided through a series of multiemployer health plan trust funds (the "UMWA Plans") that have been developed through successive collective bargaining agreements known as National Bituminous Coal Wage Agreements ("NBCWAs"). *Coal Comm'n Report* at 20-29; *Eastern*, 524 U.S. at 505-11. The UMWA and the Bituminous Coal Operators' Association, Inc. ("BCOA") have negotiated these agreements since 1951. *Id.* at 506.

Beginning in 1947, the NBCWAs provided for the funding of health benefits for retirees through levies assessed against the coal operators and paid into the UMWA Plans on the basis of the amount of coal mined or the number of covered hours worked. *Eastern*, 524 U.S. at 505; *Pardee*, 269 F.3d at 427. By their nature as multiemployer trusts, the UMWA Plans continued to provide benefits to eligible retirees even if the retirees' former employers went out of

---

historical background "is essential to a proper interpretation of the Act's present text"); *Edwards v. Aguillard*, 482 U.S. 578, 595 (1987) (Court considers historical context and the specific sequence of events leading to statute's enactment).

4/ *Eastern*, 524 U.S. at 505; *Coal Comm'n Report at* 5-20.

business or otherwise stopped paying into the Plans. *Pardee*, 269 F.3d at 427; *Eastern*, 524 U.S. at 511. The participating coal operators that remained financed the benefits of these so-called "orphan" retirees.[5/] The 1974 NBCWA referred expressly to retiree health benefits and provided that retired miners would retain a health services card until their death. The provision of lifetime health benefits and the extension of benefits for surviving spouses combined with various other circumstances, including the retirement of a generation of miners and rapid escalation of health care costs, to create financial problems for the UMWA Plans. *Id.* at 509-10; *Pardee*, 269 F.3d at 427-28. To protect the Plans' solvency, the 1978 NBCWA included a "guarantee" clause obligating signatories to make sufficient contributions to maintain benefits during the term of the agreement. *Eastern*, 524 U.S. at 510-11. The 1978 agreement also introduced the so-called "evergreen" clause, which required signatories to continue contributing to the UMWA Plans as long as they remained in the coal business, regardless of whether they signed a subsequent NBCWA. *Id.* at 509-10; *Bellaire*, 995 F. Supp. at 128.

Despite the 1978 changes, by the late 1980s, the UMWA Plans were in financial trouble. *Eastern*, 524 U.S. at 511. As health care costs increased, coal operators exited the coal industry in increasing numbers and "dumped" their retirees into the UMWA Plans, where their benefits would be funded by those operators still mining coal.[6/] As the number

---

5/ *Pardee*, 269 F.3d at 427; *Sigmon*, 122 S. Ct. at 947 n.4 ("term 'orphan retirees' encompassed both 'true orphans,' whose former employers were no longer in business and 'reachback orphans' whose former employers were still in business but no longer signatories to a coal wage agreement").

6/ *Eastern*, 524 U.S. at 510-11; *Coal Comm'n Report* at 75 (statement of Vice Chairman Perritt) (employers have been allowed to

of coal operators contributing to the UMWA Plans dwindled, fewer and fewer operators remained to carry the burden of rapidly rising health care costs, not only for their own retirees but also for thousands of retirees with whom none of the remaining contributing operators had ever had any employment relationship.[7/] As a result, the continued viability of the UMWA multiemployer health care system was cast into serious doubt.

This funding crisis for orphan retirees culminated in 1989, when the UMWA led a ten-month strike against the Pittston Coal Company, a major coal producer that refused to sign the 1988 NBCWA. *Eastern*, 524 U.S. at 511; *Pardee*, 269 F.3d at 428. The dispute was not resolved until Secretary of Labor Dole intervened. As part of the settlement, the Secretary established the Coal Commission to study the retiree health care crisis and to recommend "a solution for ensuring the orphan retirees in the [UMWA Plans] will continue to receive promised medical care." *Coal Comm'n Report* at 2; *Pardee*, 269 F.3d at 428. The Coal Commission observed that coal miners had, in their labor negotiations, "traded lower pensions over the years for better health care benefits," and thus were entitled to received the promised benefits. *Coal Comm'n Report*, Exec. Summary at vii; *Eastern*, 524 U.S. at 511-12. On November 5, 1990, the

---

dump their retiree health benefit obligations on the existing health care funds and to evade contribution obligations).

7/ *See Eastern*, 524 U.S. at 510-11; HOUSE COMMITTEE ON WAYS AND MEANS, 103D CONG., 1ST SESS., FINANCING UMWA COAL MINERS "ORPHAN RETIREE" HEALTH BENEFITS (Comm. Print 1993) [hereinafter "*Financing Orphan Retirees*"] at 25 (BCOA employers complained that for every $1 they paid into the Fund for their own retirees, they were paying an additional $3 for other companies' retirees); *Coal Comm'n Report*, Exec. Summary at vii ("Signatory coal operators who are still in the coal business are willing to pay the fair cost of their retirees, but are increasingly unwilling to shoulder the burden of paying for orphans").

Coal Commission issued its Report recommending that "a statutory obligation to contribute to the plans should be imposed on current and former signatories to the [NBCWAs]." *Coal Comm'n Report*, Exec. Summary at vii.

Recognizing that health benefits for more than 100,000 beneficiaries were in jeopardy and that many of the beneficiaries were retired miners and dependents whose former employers were no longer in business, Congress undertook its own intensive examination of the crisis.[8/] In March 1992, Congress passed an earlier version of the Coal Act, which funded health care for orphan retirees through a controversial industry-wide tax on future coal production.[9/] This version was passed as part of more extensive tax legislation, which President Bush vetoed. *Sigmon*, 122 S. Ct. at 948 n.6. The expiration of the 1988 NBCWA, scheduled for February 1993, loomed on the horizon, and members of Congress continued to push for legislation.[10/]

After much negotiation, the final version of the bill provided that only companies that were signatory to one or more coal wage agreements would be required to help

---

8/ *Sigmon*, 122 S. Ct. at 947; *Financing Orphan Retirees* at 25.

9/ *Eastern*, 524 U.S. at 513; *see* 138 Cong. Rec. 5,325-35 (1992) (Senate debate on industry-wide tax to finance orphan health care).

10/ *Sigmon*, 122 S. Ct. at 948 n.6; 138 Cong. Rec. 5,333 (1992) (remarks of Sen. Rockefeller) (crisis created by approaching expiration of the 1988 agreement which threatened to leave thousands of orphan retirees with no benefits); *id.* at 34,005 (reproducing submission by Senator Wallop, CONGRESSIONAL RESEARCH SERVICE REPORT FOR CONGRESS, 102D CONG., 2D SESS., COAL INDUSTRY: USE OF ABANDONED MINE RECLAMATION FUND MONIES FOR UMWA "ORPHAN RETIREE" HEALTH BENEFITS (1992) [hereinafter "*CRS Report*"] (coal industry faced imminent time deadline to find solution for funding orphan retirees because 1988 Agreement was scheduled to expire and failure to resolve the issue could have led to a strike by miners or refusal by coal companies to fund benefits).

finance retiree health care for the beneficiaries of the UMWA Plans. *Sigmon*, 122 S. Ct. at 948 n.6. The Coal Act in its final form was enacted on October 24, 1992, as part of the Energy Policy Act of 1992, Pub. L. No. 102-486, 106 Stat. 2776, 3036-56. The statute placed a strong emphasis on "identifying the former signatory employer of each beneficiary." *Financing Orphan Retirees* at 51. Within the Coal Act itself, Congress explicitly found that:

> it is necessary to modify the private health care benefit plan structure for retirees in the coal industry to identify persons most responsible for plan liabilities in order to stabilize plan funding and allow for the provision of health care benefits to such retirees.

26 U.S.C. § 9701 (historical note). Congress further stated (*id.*) that the policy of the Coal Act was:

> to remedy problems with the provision and funding of health care benefits with respect to the beneficiaries of multiemployer benefit plans that provide health care benefits to retirees in the coal industry . . . [and] to provide for the continuation of a privately financed self-sufficient program for the delivery of health care benefits to the beneficiaries of such plans.

II. STRUCTURE OF THE COAL ACT

A. Eligibility For Benefits And Liability Structure

Persons are eligible for benefits from the Combined Fund if, as of July 20, 1992, they were eligible to receive, and were receiving, benefits from either of the two then-existing collectively bargained UMWA health care plans—the UMWA 1950 Benefit Plan and the UMWA 1974 Benefit Plan. 26 U.S.C. § 9703(f). The beneficiary population of the Combined Fund is thus closed, and the number of beneficiaries will gradually decline. *Financing Orphan*

Retirees at 66. Indeed, during the current Combined Fund plan year, the number of remaining beneficiaries is only around half of the approximately 108,000 with which the Combined Fund began operations in February 1993.

To finance the Combined Fund, Congress apportioned liability to coal operators on a "pay for your own" basis. *Pardee*, 269 F.3d at 428.[11/] This principle is codified at Section 9706(a) of the Coal Act, which directs SSA to assign Combined Fund beneficiaries to signatory operators (and "related persons" of such operators) according to a statutorily prescribed system of priorities. 26 U.S.C. § 9706(a). Under this funding system, coal operators, like Bellaire, that previously had agreed to contribute to the UMWA Plans pursuant to the terms of their collective bargaining agreements are required to pay for the care of their own former employees and their dependents. This liability scheme reflects Congress' determination that all coal operators, including Bellaire, that had employed the retirees in question, "and thereby benefited from their services, [should] be assigned responsibility for providing the health care benefits promised in their various collective bargaining agreements." 138 Cong. Rec. 34,001 (1992).

B. The Coal Act's Timetable And Interim Funding Scheme

Congress outlined a timetable for implementing the Coal Act's funding scheme. It directed that the UMWA 1950 Benefit Plan and the UMWA 1974 Benefit Plan be merged into the Combined Fund as of February 1, 1993 (the

---

11/ *See also* 138 Cong. Rec. 20,120 (1992) (remarks of Senator Ford) (Coal Act "close[s] the new orphan fund" and "allocate[s] costs according to the principle that those most responsible should bear the greatest portion of costs"); *id.* at 34,001 (proposed Senate Conference Report) (Coal Act is "designed to allocate the greatest number of beneficiaries in the Plans to a prior responsible operator").

termination date of the 1988 NBCWA). 26 U.S.C. § 9702(a)(2). The Combined Fund began at that time to provide health and death benefits to surviving coal industry retirees and their dependents. 26 U.S.C. § 9703(b)(4). Under the statute, the Combined Fund's first "plan year" was the eight-month period from February 1 to September 30, 1993. 26 U.S.C. § 9702(c). Each succeeding plan year begins on October 1 and ends on the following September 30. *Id.*

Congress provided an interim funding mechanism for the Combined Fund's first plan year, while SSA performed the daunting task of assigning each of the Combined Fund's beneficiaries to a specific former employer or related person. Under Sections 9704(i) and 9705(a) of the statute, benefits for the first plan year were to be funded through a combination of $70 million transfer from the UMWA 1950 Pension Plan and interim contributions from the 1988 NBCWA signatories apportioned on the basis of the amounts of their payments to the 1950 and 1974 Benefit Plans during the term of the 1988 agreement. Once the actual health care premiums for the Combined Fund's first and second plan years were determined and assessed, the 1988 agreement operators were then entitled to a credit against those premiums in the amount of their interim contributions during the first plan year. *See* 26 U.S.C. § 9704(i)(D)(i); *see also* 138 Cong. Rec. 34,002-03 (1992) (explaining establishment of Combined Fund and financing of benefits). Under the Coal Act's scheme, the interim funding period was to end with the beginning of the Combined Fund's second plan year on October 1, 1993, and health care premiums for the first and second plan years were to be assessed and paid during the second plan year. *See* 26 U.S.C. § 9704(g)(1).

In Section 9706(a), Congress directed SSA to assign Combined Fund beneficiaries to specific former employers "before October 1, 1993." Congress anticipated that the

Combined Fund could then use those beneficiary assignments as a basis for assessing premiums—for the Combined Fund's first and second plan years—to assigned operators. *Pardee*, 269 F.3d at 428; 138 Cong. Rec. 34,003 (1992). The statutory schedule thus reflected Congress' goal of having a new benefits system in place by the time of the termination of the 1988 NBCWA on February 1, 1993, and the impossibility of completing the beneficiary assignment process between the Coal Act's October 24, 1992 enactment date and the date in February 1993 when the Combined Fund would need to begin providing benefits.

C. Funding Benefits For "Orphans"

Critical to the Coal Act's funding scheme was Congress' adoption of a method of providing for "orphan" beneficiaries in the Combined Fund (*i.e.*, Combined Fund beneficiaries whose former employers are no longer in business and who could not be assigned under the criteria in Section 9706 of the Coal Act).[12/] To help alleviate the financial burden of health care for such beneficiaries whom none of the assigned operators ever employed, Congress authorized transfers of substantial sums to the Combined Fund from the UMWA 1950 Pension Plan and from the Abandoned Mine Reclamation Fund (the "AML Fund") established under the Surface Mining Control and Reclamation Act of 1977. 26 U.S.C. § 9705(a), (b); 30 U.S.C. § 1232(h).[13/] Congress provided that, on the first day

---

12/ *See* 138 Cong. Rec. 34,001 (1992) (proposed Senate Conference Report) ("if no operator remains in business under the formulation [in Section 9706(a)], that retiree becomes an unassigned beneficiary").

13/ 138 Cong. Rec. 34,001 (1992) (subsidy for unassigned beneficiaries is "a key component of legislative compromise" and is provided in recognition that such beneficiaries were not employed by the assigned operators); *id.* at 34,004 (*CRS Report*) (evaluating proposal to transfer interest on AML Fund to "help finance UMWA orphan retiree health benefits").

of each of the Combined Fund's first three plan years, a $70 million transfer would be made from the UMWA 1950 Pension Plan to the Combined Fund. 26 U.S.C. § 9705(a). These funds, totaling $210 million, would be used in large part to defray the cost of health care for unassigned beneficiaries. 26 U.S.C. § 9705(a)(3)(B); 138 Cong Rec. 34,003 (1992) (explaining transfers). Thereafter, for Combined Fund plan years beginning on and after October 1, 1995, Congress provided for annual transfers to the Combined Fund from the AML Fund. 26 U.S.C. § 9705(b); 30 U.S.C. § 1232(h). These transfers, which are limited by the amount of annual interest earned by the AML Fund or $70 million (whichever is greater), can be used only to defray the expense of providing health benefits to unassigned beneficiaries, and the amount transferred cannot exceed the amount necessary to cover these expenses. 30 U.S.C. § 1232(h)(2) & (3).

If the transfers described in the preceding paragraph prove insufficient to cover the orphan retirees, the Coal Act provides for the assessment of an annual unassigned beneficiaries premium against all assigned operators. 26 U.S.C. § 9704(d). The unassigned beneficiaries premiums for a given plan year are to be allocated among signatory operators on the basis of their pro rata share of the beneficiaries that have been assigned for that year. *Id.* Thus, the more beneficiaries an operator is assigned, the greater its share of the total unassigned beneficiaries premiums.[14/] To date, the transfers have proven sufficient, and assigned coal operators have paid no premiums for unassigned beneficiaries. *Pardee*, 269 F.3d at 429.

14/ *Financing Orphan Retirees* at 69 (company's contributions for unassigned orphans will be in direct proportion to the number of its assigned beneficiaries; thus, companies with largest dollar responsibility will bear largest dollar responsibility for orphan retirees).

D. Obstacles To SSA's Assignment Process

Once the Coal Act became law, SSA was charged with the massive responsibility of implementing Section 9706(a)'s assignment criteria, which required identifying and locating former employers for more than 100,000 beneficiaries, and unraveling the corporate relationships between employers and potentially related companies.[15/] Despite the magnitude of the task, no funds were appropriated for SSA to commence its assignment work until July 13, 1993.[16/] This was less than 80 days before October 1, 1993, the date by which SSA was to have assigned Combined Fund beneficiaries to the appropriate former employers. In early September 1993, the House Committee on Ways and Means was aware that SSA would not complete the initial assignments by October 1, 1993:

> SSA anticipated that checking the [employment] records would be very time consuming . . . Linking an individual's work history to a specific employer will . . . require searching through microfilm records and entering the information by hand into the computer system. Preliminary estimates by the SSA suggest that it would take approximately 150 work years just to retrieve the microfilm records. This does not include the additional work involved in determining the assignment to an employer. On a routine basis,

---

15/ *Financing Orphan Retirees* at 64-65 (most Combined Fund beneficiaries retired before 1976, social security records were not computerized prior to 1978, and SSA does not maintain information needed to track the interrelationships among companies to identify "related persons"); J.A. 179-84 (Decl. of Richard Harron, Dir. of Div. Coverage and Support, SSA) (describing difficulty of assignment process and SSA's effort to complete it on time).

16/ Supplemental Appropriations Act of 1993, H.R. 2118, Pub. L. No. 103-50, Ch. V, 139 Cong. Rec. D. 765.

> SSA has 140 technicians specially trained to work with the microfilm records, which are difficult to decipher. *Extra resources would be needed to complete the assignments by the October 1, 1993 target date.*

Financing Orphan Retirees at 64-65 (emphasis supplied). Congress provided no extra resources to expedite the initial assignment process. There is no indication, however, that Congress believed that any initial assignments of Combined Fund beneficiaries made on or after October 1, 1993 would be automatically void or that the liability scheme envisioned in the Coal Act would be substantially altered by treating as "unassigned" thousands of beneficiaries who properly could be assigned according to the statutory criteria.

Because of Congress' delayed funding and SSA's limited resources, approximately 10,000 initial assignments of Combined Fund beneficiaries were made on or after October 1, 1993. At the time of the proceedings in the district court, these assignments accounted for approximately $112 million in premiums that had been assessed to the 247 operators who received such assignments. 01-715 Pet. App. 52a-54a. The Combined Fund had collected approximately $105 million of this amount, an amount that presumably would need to be refunded if all assignments made on or after October 1, 1993 were void. *Id.*

III. PROCEEDINGS BELOW

In June 1999, Bellaire filed a six-count complaint against SSA, challenging the assignment of Combined Fund beneficiaries on various grounds. Among Bellaire's claims was its contention that, under the Coal Act, the 270 beneficiaries that SSA initially assigned to Bellaire on or after October 1, 1993 were improperly assigned and that those beneficiaries instead should be permanently unassigned. J.A. 83-85. According to Bellaire, Section 9706(a)'s statement that SSA "shall" make assignments

"before October 1, 1993" established a jurisdictional deadline by which SSA was required to make initial beneficiary assignments to signatory operators.

Bellaire's argument was based on the Sixth Circuit's earlier decision in *Dixie Fuel*. The Sixth Circuit there held that SSA had no continuing power to make initial assignments of Combined Fund beneficiaries to signatory operators on or after October 1, 1993. The court reasoned that the word "shall" in Section 9706(a) unambiguously expressed Congress' intent that SSA complete all initial assignments before October 1, 1993, and that the Coal Act's entire scheme for assigning beneficiaries and financing the Combined Fund confirmed this interpretation. 171 F.3d at 1062-63.

On April 5, 2000, Bellaire moved for preliminary and permanent injunctive relief, partial summary judgment, and for the entry of final judgment on its *Dixie Fuel* claim.[17/] Based entirely on *Dixie Fuel*, the district court entered judgment in favor of Bellaire. 01-705 Pet. App. 12a-13a. It directed the Trustees to provide Bellaire with a credit in the amount of the total premiums previously paid for the 270 beneficiaries at issue. *Id.* The court of appeals affirmed in reliance on *Dixie Fuel*. *Id.* at 3a-4a (*Dixie Fuel* "controls until and unless 'an inconsistent decision of the United States Supreme Court requires modification of the decision or [the Sixth Circuit] sitting en banc overrules the prior decision.'").

Dixie Fuel, the court's sole basis for ruling in favor of Bellaire, is dubious precedent. The ruling in *Dixie Fuel* had

---

17/ The April 5, 2000 motion was filed only against SSA, because the district court had not yet granted the Trustees' motion to intervene as party-defendants, a motion that Bellaire opposed. After the district court granted the Trustees' motion to intervene, Bellaire filed a motion against the Trustees that was in all other material respects identical to the one filed against SSA on April 5, 2000.

no practical effect on the parties in that case, and indeed, it appears clear that the court of appeals lacked jurisdiction to render its decision. The case came to the court of appeals under 28 U.S.C. § 1292 (a)(1), on plaintiff's appeal from the district court's denial of its motion for a preliminary injunction. By the time the court of appeals heard the case, however, the preliminary injunction motion had become moot. This Court had decided *Eastern* in June 1998, and, on the basis of that decision, SSA notified Dixie Fuel that all of its beneficiary assignments were void (for reasons having nothing to do with the date on which the assignments were made). Accordingly, Dixie Fuel's preliminary injunction motion—and the appeal from the denial of that motion—were moot, because neither the government nor the Combined Fund was seeking to collect any premiums from Dixie Fuel or otherwise to impose any Coal Act obligations against the company. As a consequence, Dixie Fuel was not threatened with any harm, irreparable or otherwise, during the pendency of the litigation. Under these circumstances, the court of appeals' appellate jurisdiction under Section 1292(a)(1) was nonexistent. *University of Texas v. Camenisch*, 451 U.S. 390 (1981).

Moreover, before the court of appeals decided the case, Dixie Fuel moved for, and the district court granted, *final judgment* for Dixie Fuel as a matter of law, as a result of *Eastern* and the consequent voiding of Dixie Fuel's beneficiary assignments. *Dixie Fuel Co. v. Callahan*, No. 97-373 (E.D. Ky. Jan. 7, 1999). SSA, the only defendant in the case, did not appeal. Thus, the entire case had been concluded for some time, when in late March 1999, the court of appeals decided the appeal from the denial of a preliminary injunction. By that time, not only had the preliminary injunction motion become moot, but the entire case was over, and there was no case or controversy left for the Sixth Circuit to decide. Though the court's decision has generated extensive litigation, with a huge potential impact

on the Combined Fund and the Coal Act's allocation of liability, it had no effect whatever on Dixie Fuel itself, whose assignments already had been voided and which therefore had no Coal Act liability.

SUMMARY OF THE ARGUMENT

As the Fourth Circuit correctly concluded in *Pardee*, 269 F.3d at 438, "[t]o excuse the financial obligations of coal operators, where liability is both identifiable and identified, would frustrate the text, purpose, and legislative history of the [Coal] Act." Yet that is precisely the result Bellaire seeks here, in attempting to jettison responsibility for the 270 Combined Fund beneficiaries at issue. Bellaire does not dispute that it is the signatory operator to which these beneficiaries should have been assigned under the Coal Act's criteria. Nonetheless, because the beneficiaries were assigned to Bellaire after September 30, 1993, and because they had not previously been assigned to any other operator, Bellaire seeks a windfall of several million dollars. Because SSA did not act quickly enough, Bellaire maintains that it should be permanently relieved of responsibility for the beneficiaries in question and that the cost of financing their health care should be shifted either to the AML Fund or to the entire group of assigned operators, all of whom have either no employment connection to these beneficiaries or a lesser connection than Bellaire. Bellaire's position cannot be reconciled with prior authority from this Court.

This Court has ruled that even when a statutory date is paired with mandatory language such as the word "shall," a government agency will not "in the ordinary course" be divested of power to act after a statutory date. *United States v. James Daniel Good Real Property*, 510 U.S. 43, 63 (1993); *United States v. Montalvo-Murillo*, 495 U.S. 711, 717 (1990); *Brock v. Pierce County*, 476 U.S. 253, 260-66 (1986). The presumption in favor of agency retention of the authority to act, repeatedly applied by the Court, is based on

the public policy that the public interest should not be prejudiced by the failings of government officials. *United States v. Nashville, C. & St. L. Ry. Co.*, 118 U.S. 120, 125 (1886). *Dixie Fuel* virtually ignored this line of precedent, and acted instead as if the question of SSA's authority to make initial assignments of Combined Fund beneficiaries after September 30, 1993 was resolved by the statutory declaration that assignments "shall" be made before October 1, 1993. To the contrary, however, the statutory date only raises, but does not answer, that question.

Congress' use of the mandatory word "shall" in the Coal Act does not depart from "the ordinary course," nor does any other provision of the Coal Act indicate that the statutory date is jurisdictional rather than directory. The important issue is not whether the word "shall" is used, but whether Congress has specified in the statute what should happen if the government fails to comply with the prescribed date. Nowhere in the Coal Act did Congress state or suggest that, if SSA could not complete beneficiary assignments by October 1, 1993, Congress wanted SSA to terminate the initial assignment process and deposit the remaining retirees and dependents into the category of unassigned beneficiaries. The plain purpose of the October 1, 1993 date was to spur SSA to make the assignments promptly so that the Combined Fund could assess health care premiums at the beginning of its second plan year and thus secure a steady flow of monthly premium payments after the conclusion of the statutory interim funding arrangements for the first plan year. That in no way implies that Congress wanted to relieve employers of financial responsibility for former employees that SSA was unable to assign until after October 1, 1993.

There is no sensible reason why Congress would intend such a result. The ruling below and in *Dixie Fuel* undercuts Congress' carefully crafted liability structure. Treating thousands of eligible retirees and dependents as

unassigned solely because the assignments were not completed by October 1, 1993, would shift liability from former employers and related persons, such as Bellaire, who have the most proximate connection to the Combined Fund beneficiaries, to less responsible assigned operators, most (if not all) of which had no employment connection at all with the beneficiaries. Congress could not have intended its framework to be so disrupted simply because SSA was unable to complete the assignment process before October 1, 1993.

Nor can such disruption be justified by any alleged need to permanently fix assignments by October 1, 1993 for the liability scheme to work properly. It is undisputed (and acknowledged in *Dixie Fuel*) that, under the Coal Act, beneficiary assignments made before October 1, 1993 and later determined to be incorrect could be rescinded and the beneficiaries involved reassigned to other employers. *See Dixie Fuel*, 171 F.3d at 1061, 1064; 26 U.S.C. § 9706(f)(3)(ii). Accordingly, the entire issue here could have been avoided if SSA, on September 30, 1993, simply had assigned at random all not-yet-assigned beneficiaries to some particular coal company. These assignments then could have been reviewed at a later date and the appropriate corrections could have been made. But, because SSA (having no reason to believe that the statute would be interpreted as it has been by the Sixth Circuit) did not employ such a strategy, the court of appeals would forever bar SSA from assigning the beneficiaries at issue to the proper operators.

This peculiar result perhaps would be more tolerable if there were any indication that Congress intended the October 1, 1993 date to confer rights on the signatory operators. Nothing in the Coal Act, however, suggests that Congress was concerned with protecting any interest in repose or certainty on the part of the signatory operators, and

thus adopted some sort of across-the-board amnesty for health care premiums for beneficiaries not assigned before October 1, 1993. There is not a hint in the proceedings below or in *Dixie Fuel* that any assigned operator is even remotely prejudiced by the date of the assignments at issue. Here, for example, there is no dispute that the beneficiaries *should have been* assigned to Bellaire under the criteria in Section 9706(a). If SSA had made the assignments before October 1, 1993, Bellaire would have been asked to pay the exact same amount that it is being asked to pay today. The *only* reason why Bellaire has been absolved of liability is that SSA made its determination "too late." Nothing in the text of the Coal Act suggests that this is the result Congress intended.

Under this Court's well-established canon of statutory construction, the absence of any clearly expressed consequence of SSA's non-compliance compels the conclusion that Congress did not intend for SSA to forfeit its authority to make initial assignments after September 30, 1993. Even if it were necessary to continue beyond an analysis of the statutory text, however, other indicia of congressional intent foreclose any suggestion that Congress intended Section 9706's date to be jurisdictional. The Coal Act's legislative history, purpose, and historical context demonstrate that the unassigned beneficiary designation was intended to be reserved for beneficiaries who were *unassignable* under the statutory criteria, *i.e.*, orphan retirees and their dependents. Congress intended to keep the number of unassigned beneficiaries to an absolute minimum, not to increase that number by thousands because of administrative delay.

Furthermore, voiding all initial assignments made on or after October 1, 1993 would undermine Congress' express purpose of stabilizing funding of a *private* health care benefit plan. If the Sixth Circuit's approach were upheld, an

increased amount would be needed from the AML Fund to help defray the health care expenses of the increased number of unassigned beneficiaries. These funds then would not be available for other public uses, such as to reclaim abandoned mine lands, which was the original purpose for the AML Fund.

If any ambiguity remains, the Court should defer to SSA's reasonable interpretation of the statute, which expressly committed to the agency the Combined Fund beneficiary assignment process. SSA reasonably interpreted "unassigned beneficiaries" to include only those beneficiaries for whom no signatory operator or related person could be identified. Having received no instruction from Congress that any unfinished assignment work should be discontinued on October 1, 1993, SSA proceeded to make original assignments after that date. This had the effect of placing financial responsibility for the affected beneficiaries' health care exactly where Congress intended to place it. Because SSA's interpretation is consistent with the Coal Act, it should be upheld, and original assignments made on or after October 1, 1993 should not be invalidated on the basis of their timing.

ARGUMENT

I. THE DECISIONS BELOW CONFLICT WITH THIS COURT'S PRECEDENTS REGARDING THE EFFECT OF A GOVERNMENT AGENCY'S NON-COMPLIANCE WITH A STATUTORY DATE.

The Sixth Circuit stripped SSA of the authority to make initial beneficiary assignments under Section 9706(a) solely because the agency was unable to complete the task "before October 1, 1993." The court considered itself bound by *Dixie Fuel*, and simply adhered to the earlier decision, without further analysis. *Dixie Fuel*, however, applied the wrong analytical framework for determining the legal effect

of a government agency's failure to meet a statutory date, and this led to an erroneous interpretation of the Coal Act.

Congress directed in Section 9706(a) of the Coal Act that SSA "shall, before October 1, 1993" initially assign each eligible beneficiary to a signatory operator or related person that remains in business. 26 U.S.C. § 9706(a). According to *Dixie Fuel*, this language, "plain on its face," is "explicitly mandatory." 171 F.3d at 1061. If by this characterization the Sixth Circuit meant that Congress wanted initial Combined Fund beneficiary assignments to be made before October 1, 1993, no one would quarrel. But the Sixth Circuit meant far more. It assumed that its use of the label "mandatory" resolved the question of whether SSA retained authority to make initial assignments of Combined Fund beneficiaries after September 30, 1993.[18/] That was error.

The Coal Act's direction to act by a statutory date merely raises, but does not answer, the question presented here.[19/] It does not determine whether SSA loses jurisdiction to act if it has not completed its work on schedule. As this Court held in *Brock v. Pierce County*, 476 U.S. 253, 262 (1986), "the mere use of the word 'shall' . . . standing alone, is not enough to remove [the agency's] power to act after" the statutory date. Although *Dixie Fuel* gave *Brock* a formalistic nod, *see* 171 F.3d at 1062, the court analyzed the issue as if SSA were required to overcome a general

18/ *See Kelso v. United States Dep't of State*, 13 F. Supp. 2d 12, 14-15 (D.D.C. 1998) ("The word 'mandatory,' though it sounds redoubtable and impressive, is no more than a term of art with a precise legal meaning; one that bears no resemblance to that advocated by the Plaintiff.").

19/ *Kelso*, 13 F. Supp. 2d at 14-15 (finding a word "mandatory" is only part of the inquiry needed to determine whether and to what extent to sanction agencies that fail to comply with a statutory deadline).

presumption against its power to act after September 30, 1993.

Such a presumption is the opposite of that applied by this Court, which repeatedly has held that the use of mandatory language such as "shall" does not, in the ordinary course, divest a government agency of the power to act after a statutory date. *United States v. James Daniel Good Real Property*, 510 U.S. 43, 63 (1993) (unanimously holding that if a statute "does not specify a consequence of noncompliance with statutory timing provisions, the federal courts will not in the ordinary course impose their own coercive sanction"); *see Regions Hosp. v. Shalala*, 522 U.S. 448, 460 n.3 (1998) ("The Secretary's failure to meet the deadline, a not uncommon occurrence when heavy loads are thrust on administrators, does not mean that official lacked power to act beyond it."); *United States v. Montalvo-Murillo*, 495 U.S. 711, 718 (1990) ("Although the duty is mandatory, the sanction for breach is not loss of all later powers to act."); *General Motors Corp. v. United States*, 496 U.S. 530, 542 (1990) ("In the absence of a specific provision suggesting that Congress intended to create an enforcement bar [as the consequence of a missed statutory date], we decline to infer one."); *Brock*, 476 U.S. at 260 ("We would be most reluctant to conclude that every failure of an agency to observe a procedural requirement voids subsequent action, especially when important public rights are at stake.").

Congress will not be deemed to have departed from the "ordinary course" unless it clearly says so by specifying a consequence in the statute for non-compliance with the timing provision, *James Daniel Good*, 510 U.S. at 63, or by using negative words that prohibit the agency from acting in any other manner or at any other time than that specified.[20/]

20/ *E.g., In re Siggers*, 132 F.3d 333, 336 (6th Cir. 1997) (quoting *French v. Edwards*, 80 U.S. (13 Wall.) 506, 511 (1871)); 3 NORMAN J.

Here, of course, the statute contains no such negative words. The Coal Act does not say that SSA may not make beneficiary assignments on or after October 1, 1993, and it does not say that any assignments made on or after that date are automatically invalid.

Thus, contrary to *Dixie Fuel*'s approach, the general presumption in this context is *against* forfeiture of an agency's power to act. This Court's rulings on the point go back more than a century,[21/] and the principle has been applied in a multitude of contexts by many federal courts of appeals.[22/] Congress presumably was aware of this well-

---

SINGER, SUTHERLAND ON STATUTES AND STATUTORY CONSTRUCTION § 57:19 (6th ed. 2001) [hereinafter *Statutory Construction*] (the "absence of negative words may be considered in support of directory construction").

21/ *United States v. Nashville, C. & St. L. Ry. Co.*, 118 U.S. 120, 125 (1886) ("It is settled beyond doubt or controversy, upon the foundation of the great principle of public policy . . . which forbids that the public interests should be prejudiced by the negligence of the officers or agents to whose care they are confided . . . unless congress clearly manifested its intention that they should be so bound [by a statute of limitations]."); *French*, 80 U.S. at 511; *Brown v. Duchesne*, 60 U.S. 183, 195 (1856) ("Neither will the court, in expounding a statute, give to it a construction which would in any degree disarm the Government of a power which has been confided to it to be used for the general good . . . unless plain and express words indicated that such was the intention of the Legislature.").

22/ *United States v. General Motors Corp.*, 876 F.2d 1060 (1st Cir. 1989) (Clean Air Act); *United States v. Boccanfuso*, 882 F.2d 666, 671 (2d Cir. 1989) (Clean Air Act); *Southwestern Pa. Growth Alliance v. Browner*, 121 F.3d 106, 114 (3d Cir. 1997) (Clean Air Act); *Pardee*, 269 F.3d at 431 (Coal Act); *Fort Worth Nat'l Corp. v. FSLIC*, 469 F.2d 47, 58 (5th Cir. 1972) (National Housing Act); *In re Siggers*, 132 F.3d 333, 336 (6th Cir. 1997) (habeas corpus); *Hendrickson v. FDIC*, 113 F.3d 98, 101 (7th Cir. 1997) (Federal Deposit Insurance Act); *Kinion v. United States*, 8 F.3d 639, 644 (8th Cir. 1993) (Agricultural Credit Act); *Idaho Farm Bureau Fed'n v. Babbitt*, 58 F.3d 1392, 1400 (9th Cir. 1995) (Endangered Species Act); *Twin Pines Coal Co. v. United States Dep't of Labor*, 854 F.2d 1212, 1216 (10th Cir. 1988) (Federal Mine Safety and Health Act);

established canon of statutory construction and the applicable case law when it enacted the Coal Act.[23/]

Virtually ignoring the foregoing line of authority and relying instead on *United States v. Monsanto*, 491 U.S. 600, 607 (1989), and like cases, *Dixie Fuel* attributed undue weight to its determination that the word "shall" is mandatory. 171 F.3d at 1061-62. *Monsanto* and other cases cited by *Dixie Fuel* had nothing to do with the effect of a government agency's failure to meet a statutory date.[24/]

Marshall Durbin Food Corp. v. I.C.C., 959 F.2d 915, 919 (11th Cir. 1992) (Interstate Commerce Act); *Brotherhood of Ry. Carmen Div., Transp. Communications Intern. Union v. Pena*, 64 F.3d 702, 704 (D.C. Cir. 1995) (Federal Railroad Administration regulations); *Gottlieb v. Pena*, 41 F.3d 730, 734 (D.C. Cir. 1994) (Coast Guard Authorization Act); *Oy v. United States*, 61 F.3d 866, 871 (Fed. Cir. 1995) (Antidumping Act regulations).

23/ *Gottlieb*, 41 F.3d at 736 ("Congress is deemed to act with knowledge" of *James Daniel Good, Brock, etc.*); *Pardee*, 269 F.2d at 433 (same); *see McNary v. Haitian Refugee Center, Inc.*, 498 U.S. 479, 496 (1991) ("presumable that Congress legislates with knowledge of our basic rules of statutory construction," including a "well-established presumption"); *Young v. United States*, 122 S. Ct. 1036, 1040 (2002) (Congress must be presumed to draft limitations periods in light of "hornbook law" that limitations periods are subject to equitable tolling).

24/ The cases cited in *Dixie Fuel* were decided in the following very different contexts: *United States v. Monsanto*, 491 U.S. 600 (1989) (criminal defendant who is convicted "shall" forfeit property related to the crime); *Societe Nationale Industrielle Aerospatiale v. United States District Court*, 482 U.S. 522, 534 & n.15 (1987) (Hague Evidence Convention's omission of mandatory language such as "shall" indicates that treaty was not intended to provide exclusive and mandatory procedure for obtaining documents within foreign territory); *Hewitt v. Helms*, 459 U.S. 460, 471-72 (1983) (use of mandatory terms like "shall" in regulations for confining prison inmates to administrative segregation created liberty interest protected by Due Process Clause); *Anderson v. Yungkau*, 329 U.S. 482, 485-86 (1947) (a civil case "shall" be dismissed against decedent under Fed. R. Civ. P. 25(a) if substitution not made within two years).

Cases like *James Daniel Good* and *Brock*, by contrast, specifically arose in the latter context. They acknowledge the interpretive principles and public policy concerns that govern when and under what circumstances time constraints can be imposed on a government agency's power to complete its delegated tasks.[25/]

In *Brock*, for example, the Court considered whether the Secretary of Labor lost the power to recover misused funds from participants in a training program because he failed to make timely final determinations under the program's authorizing statute. 476 U.S. at 253. The statute provided that the Secretary "shall issue a final determination as to the misuse of" such funds within 120 days. *Id.* Notwithstanding the statute's use of the term "shall," the Court held that the Secretary of Labor did *not* lose his power to recover misused funds even if the requisite final determination did not come until after the statutory date. *Id.* at 264. The Court reasoned that the Secretary's responsibility to issue final determinations was a "substantial task," and that his ability to complete it within 120 days was "subject to factors beyond his control." *Id.* at 259. Rejecting the argument that the Secretary lacked authority to act, the Court found it difficult "to believe that Congress intended such drastic consequences to follow from the Secretary's failure to meet the 120-day deadline," particularly since the

25/ *See James Daniel Good*, 510 U.S. at 64 ("There is no presumption or general rule that for every duty imposed upon the government there must exist some corollary punitive sanctions for departures or omissions, even if negligent."); *id.* at 63 ("many statutory requisitions intended for the guide of officers in the conduct of business devolved upon them do not limit their power or render its exercise in disregard of the requisitions ineffectual") (citations and internal quotations omitted); *Brock*, 476 U.S. at 260 (public policy forbids that the negligence of government officers be permitted to prejudice the public interest).

taxpaying public would be prejudiced by the Secretary's inability to recover the misused funds. *Id.* at 259-62.

Here, proper implementation of the Coal Act's beneficiary assignment system affects thousands of retirees as well as hundreds of operators and former operators within the coal industry, and SSA's task of researching retirees' work histories and assigning them to the most responsible entities was enormous. Further, SSA's ability to complete its task in a timely manner was dependent on circumstances over which the agency had no control. SSA could not begin the assignment process until Congress provided funding on July 13, 1993, and, once funded, SSA had to rely on the cooperation of other entities to gather the information needed to assign retirees in accordance with the statutory criteria.[26/] In addition, as in *Brock*, conserving public funds—in particular, the AML Fund monies earmarked for mine reclamation activities—is in the public interest. Absent a very clear expression of congressional intent to produce such a result, SSA's tardiness should not mean that public funds, rather than Bellaire's funds, are used to pay for the health care of Bellaire's retirees.

26/ *E.g.*, 26 U.S.C. § 9706 (d) (directing federal agencies to "cooperate" with SSA in its effort to gather the information needed to make assignments).

II. NOTHING IN THE COAL ACT REFLECTS A CONGRESSIONAL INTENT THAT SSA LOSE JURISDICTION TO MAKE INITIAL ASSIGNMENTS ON OCTOBER 1, 1993 AND THAT BENEFICIARIES NOT YET ASSIGNED ON THAT DATE BE DESIGNATED AS FOREVER UNASSIGNED.

The Coal Act makes clear that Congress wanted all initial assignments of Combined Fund beneficiaries to be made before October 1, 1993. 26 U.S.C. § 9706(a). The statute also makes clear, however, that Congress wanted Combined Fund beneficiaries to be assigned according to the criteria set forth in Section 9706(a), and that Congress wanted as many beneficiaries as possible to be assigned to specific employers or related persons, so that the number of unassigned beneficiaries could be kept to an absolute minimum.[27/] Because in some cases SSA did not meet the statutory date, Congress necessarily has been deprived of full adherence to its intended schedule. But, like other federal statutes, the Coal Act does not suggest that this departure also should require a departure from Congress's intended substantive scheme. *See, e.g., Regions Hospital,* 522 U.S. at 459-60 (Congress would intend government agency to "exercise . . . authority to effectuate the Legislature's overriding purpose" rather than perpetuate error due to agency's failure to act swiftly enough); *St. Regis Mohawk Tribe v. Brock,* 769 F.2d 37, 41 (2d Cir. 1985), *cert. denied,*

27/ *E.g.*, U.S.C. § 9701 (historical note) ("it is necessary to . . . identify persons most responsible for plan liabilities"); 138 Cong. Rec. 34,002 (1992) ("[T]he Conference Agreement's overriding purpose is to find and designate a specific obligor for as many beneficiaries in the Plans as possible."); *id.* at 34,003 ("The Conference Report's purpose is to assure that any beneficiary, once assigned, remains the responsibility of a particular operator, and that the number of unassigned beneficiaries is kept to an absolute minimum.").

476 U.S. 1140 (1986) (statutory deadline not jurisdictional because Clean Air Act sets up a "hierarchy of priorities" in which goal of improving air quality takes precedence over other goals).

As noted above, the Coal Act neither prohibits initial assignments from being made on or after October 1, 1993, nor does it say that any Combined Fund beneficiary not assigned by October 1, 1993 shall be permanently classified as "unassigned." *Pardee*, 269 F.3d at 433. Read as a whole, the Coal Act uses the term "unassigned" to refer only to beneficiaries who are *unassignable* because SSA was unable to identify an existing employer that satisfies Section 9706's criteria; there is no indication that the "unassigned" designation should be applied merely because SSA had not yet completed the initial assignment process. *See Davis v. Michigan Dep't of Treasury*, 489 U.S. 803, 809 (1989) ("the words of a statute must be read in their context and with a view to their place in the overall statutory scheme"); *Chevron v. Natural Resources Defense Council*, 467 U.S. 837 (1984) ("the meaning of a word must be ascertained in the context of achieving particular objectives"); *cf. Sigmon*, 122 S. Ct. at 948 (beneficiary is "unassigned" if "no existing company falls within [Section 9706(a)'s] categories").

Notwithstanding the foregoing, the Sixth Circuit in *Dixie Fuel* ruled that the Coal Act specified a consequence for SSA's delay, because any beneficiary not assigned before October 1, 1993 could be treated as an unassigned beneficiary. 171 F.3d at 1063 ("The consequence flowing from the failure of the Commissioner to make those assignments before October 1, 1993, is clear from the plain language of the statute: the eligible beneficiaries who were not assigned are the unassigned beneficiaries."). But this approach simply assumes away the issue in this case. Respondent in *Brock* could just as well have declared that, on the 121st day, the Secretary of Labor's determination had to

be final or there could be no enforcement action. *See also Oy v. United States,* 61 F.3d at 872 (in rejecting claim that revocation of anti-dumping finding is necessary consequence of agency's failure to meet statutory deadline, Federal Circuit states that "this argument assumes the very argument urged by" the importer).

Altogether missing from *Dixie Fuel* is any consideration of whether the language of the Coal Act indicates that *Congress intended* beneficiaries to be designated "unassigned" as a "consequence" of SSA's lateness (*i.e.*, whether there is any apparent linkage between unassigned status and non-compliance with the statutory date).[28/] The Coal Act, when read as a whole, shows that the statutory provisions for financing the health care of unassigned beneficiaries are intended to provide a safety net for financing orphans' benefits, not to sanction SSA for not completing the assignment process fast enough or to provide a windfall for responsible operators who did not receive their assignments "in time."[29/] It is clear from the structure of the Coal Act's remedial scheme and the nature of the practical problem faced by Congress that the statutory date of October 1, 1993 was connected to the legislative need to have a new system in place by the time of the termination of the 1988 NBCWA on February 1, 1993 and the impossibility of completing the beneficiary assignment process contemplated by Congress between the October 24, 1992 enactment date

28/ *See Statutory Construction* § 57:8 ("[t]he problem . . . is one of determining whether the legislature intended to impose sanctions to secure compliance, and if so, what sanctions were intended").

29/ *See King v. St. Vincent's Hosp.*, 502 U.S. 215, 221 (1991) (it is a "cardinal rule that a statute is to be read as a whole"); *Shell Oil Co. v. Iowa Dep't of Revenue*, 488 U.S. 19, 26 (1988) (in expounding a statute, Court is not guided by a single sentence or member of a sentence, but by the provisions of the whole law, and its object and policy).

and the date in February 1993 when the Combined Fund would need to begin providing benefits. The schedule adopted by Congress was designed to protect retiree health benefits and forestall labor unrest at the end of the term of the 1988 NBCWA.[30/]

It is not surprising, then, that Congress did not say, either explicitly or implicitly, that beneficiaries not yet assigned on October 1, 1993 must be left permanently unassigned. Section 9706 does not use the term "unassigned beneficiary" at all. Section 9704(d) provides for an "unassigned beneficiaries premium," but it does not purport to define "unassigned beneficiary":

> The unassigned beneficiaries premium for any plan year for any assigned operator shall be equal to the applicable percentage of the product of the per beneficiary premium for the plan year multiplied by the number of eligible beneficiaries who are not assigned under section 9706 to any person *for such plan year*.

26 U.S.C. § 9704(d) (emphasis added). Section 9704(f) defines the term "applicable percentage":

> (1) In general. The term "applicable percentage" means, with respect to any assigned operator, the percentage determined by dividing the number of eligible beneficiaries assigned under section 9706 to such operator by the total number of eligible beneficiaries assigned under section 9706 to all such operators (determined on the basis of assignments as of October 1, 1993).

30/ *See Edwards,* 482 U.S. at 595 (historical context and sequence of events leading to passage of the statute relevant to statutory construction).

26 U.S.C. § 9704(f)(1). The statute then provides for annual adjustments in that percentage to take account of changes in assignments as a result of administrative appeals or assigned operators and their related persons ceasing to do business. 26 U.S.C. § 9704(f)(2). Read together, these provisions allocate the unassigned beneficiaries premiums among signatory operators on the basis of their pro rata share of the beneficiaries that have been assigned. None of the provisions, however, defines "unassigned beneficiary," and none suggests that beneficiaries not assigned before October 1, 1993 must be left permanently unassigned. In fact, Section 9704(d)'s reference to beneficiaries who "are not assigned under section 9706 to any person *for such plan year*" and Section 9704(f)(1)'s calculation based on assignments "as of October 1, 1993," suggest that, even if some assignments are made after October 1, 1993, the necessary calculation can be performed "as of" that date. At a minimum, the statutory provisions are ambiguous and do not foreclose SSA's interpretation.[31/]

The definitional provisions in Section 9701 do not change the situation. The terms "assigned beneficiary" and "unassigned beneficiary" are not defined, and the term "assigned operator" merely refers back to Section 9706. The statutory definitions of "assigned operator," "signatory operator," "related persons," and "business" reflect the broad coverage of the statute, and are thus consistent with the announced congressional intent "to provide the greatest

31/ *See Edelman v. Lynchburg College*, 122 S. Ct. 1145, 1154 (2002) (O'Connor, J., concurring) (where Title VII's definition section does not define "charge," and the statutory requirement that a "charge" be verified is not framed as a definition, Congress cannot be said to have unambiguously expressed its intent that a charge be verified when filed; *Chevron*-deference is due to the agency's interpretation); *Brown v. Gardner*, 513 U.S. 115, 118 (1994) ("Ambiguity is a creature not of definitional possibilities but of statutory context.").

number of beneficiaries with health care benefits paid for by a company which remains in business and was the retiree's signatory employer, or is or was a person related to such signatory."[32/]

Contrary to this intent, under *Dixie Fuel*'s interpretation, all signatory operators who otherwise would be liable under the Coal Act, but did not receive assignments before October 1, 1993, would not be classified as "assigned operators" at all. They would escape *all* responsibility, including responsibility for their own former employees as well as their proportionate share of any unassigned beneficiaries premium. Signatory operators who received at least some assignments before October 1, 1993 would become liable also for those beneficiaries for whom others were more responsible under the statutory framework. Operators who received all or nearly all of their assignments before October 1, 1993 (perhaps because they conceded liability or because their corporate structures and employment relationships were more straightforward and thus more readily susceptible to SSA's investigation) would bear the brunt of the impact. This would pervert the plan adopted by Congress and would skew Coal Act liability based on the ease and rapidity with which assignments were made—factors very different from the employment relationships with signatory operators that Congress sought to stress.

For additional reasons as well, *Dixie Fuel*'s conclusion that the Coal Act's "entire statutory scheme for assigning beneficiaries and financing the Combined Fund reflects Congress's intent that all assignments be completed by October 1, 1993" cannot withstand scrutiny. 171 F.3d at

32/ 138 Cong. Rec. 34,002 (1992); *see also id.* at 34,001 (definitions intended to be given "broad interpretation" to advance goal of assigning retirees to companies that benefited from their services).

1062. *Dixie Fuel*'s reliance on the word "shall" is undermined by the numerous appearances of the same word in other timing provisions throughout the Coal Act.[33/] Usual principles of statutory construction would require "shall" to have the same meaning in each such provision.[34/] It simply is implausible, however, that Congress would have intended *Dixie Fuel*'s interpretation to apply, with the result that all action under the Coal Act would come to a halt if any of the prescribed dates were missed. It cannot be, for example, that if Combined Fund trustees were not designated within 60 days of the statute's enactment, then they could not be designated at all, or if the required transfers from the 1950 Pension Plan to the Combined Fund were not made on the specified dates, then they could not be made at all.

Nor can the outcome in *Dixie Fuel* be justified by the court of appeals' assertion that "the calculation of the obligation of every assigned operator for payment of unassigned beneficiary premiums is dependent upon the completion of the assignment of beneficiaries by October 1, 1993." 171 F.3d at 1063. This assertion hinged on the erroneous assumption that, because the Coal Act contains a

---

33/ *E.g.*, 26 U.S.C. § 9702(a)(1) (no later than 60 days after enactment, trustees "shall" be designated); 26 U.S.C. § 9702(a)(2) (1950 and 1974 UMWA Benefit Plans "shall" be merged as of February 1, 1993); 26 U.S.C. § 9704(h) (no later than 60 days after enactment date, Combined Fund "shall" furnish information to SSA); 26 U.S.C. § 9705(a) (transfers from 1950 UMWA Pension Plan "shall" be made by specified dates); 26 U.S.C. § 9706(c) (by the later of October 24, 1992 or twentieth day after the enactment date, the UMWA Benefit Plans "shall" provide SSA with information); 26 U.S.C. § 9706(d)(2) (information "shall be promptly transmitted" from other agencies to SSA).

34/ *Comm'r of Internal Revenue v. Lundy*, 516 U.S. 235, 250 (1996) ("the normal rule of statutory construction [is] that identical words used in different parts of the same act are intended to have the same meaning"); *Brown*, 513 U.S. at 118 ("a word is known by the company it keeps") (internal quotation and citation omitted).

detailed timetable for various events, the statutory date by which SSA was to make Combined Fund beneficiary assignments is necessarily jurisdictional. This Court, however, already has rejected the argument that the existence of such a timetable divests an agency of authority to act after statutorily specified dates.

In *General Motors Corp. v. United States,* 496 U.S. 530 (1990), for example, an environmental protection statute contained a statutory deadline and an integrated timetable that reflected the urgency of establishing air-pollution controls. *Id.* at 533, 536. The agency did not comply with all of the timing provisions. Although the statute included an integrated timetable, and compliance with the timetable would have promoted the underlying objective of reducing air pollution, this Court stated that "[i]n the absence of a specific provision suggesting that Congress intended to create an enforcement bar, we decline to infer one." *Id.* at 542.

Here, not only is there no such specific provision in the Coal Act, but there is also no good policy reason for divesting SSA of the power to make assignments after the statutory date.[35/] Nothing about the Coal Act's system for calculating health care premiums makes it essential that the number of unassigned beneficiaries be determined once and for all by September 30, 1993. The number of unassigned beneficiaries has been changed on numerous occasions throughout the history of the Combined Fund, and the statute expressly contemplates that possibility. Section 9706(f) of the Coal Act provides an administrative procedure through which any assigned operator can challenge SSA's assignment

---

35/ *See Gottlieb*, 41 F.3d at 736 (even where Congress had comparably strong reasons for placing time limitations on agencies, if Congress failed to specify the consequence of a violation, Court refused to create one of its own).

of beneficiaries. 26 U.S.C. § 9706(f); 20 C.F.R. §§ 422.601-607. If, as a result of such a challenge, SSA determines that one or more assignments were in error, those assignments are rescinded, and SSA considers whether the beneficiaries can be assigned to another operator. 20 C.F.R. § 422.606(f). If SSA cannot identify any operator that fulfills the assignment criteria of Section 9706(a) with respect to a particular beneficiary, that beneficiary is treated as unassigned. *See* 26 U.S.C. § 9704(f)(2)(A); 20 C.F.R. § 422.606(f). Similarly, if and when an assigned operator is no longer "in business" within the meaning of the Coal Act and there are no related persons in existence, the beneficiaries assigned to that operator become unassigned for future years. 26 U.S.C. § 9704(f)(2)(B). In addition, SSA may reopen and revise an assignment on its own initiative within one year of its notice of assignment to the assigned operator. 20 C.F.R. § 422.607. These scenarios have occurred with some frequency since September 30, 1993, and as a consequence, the number of unassigned beneficiaries has been adjusted annually.

The same sort of adjustment occurred after this Court's decision in *Eastern*, in which the Court declared the Coal Act unconstitutional as applied to the petitioner in that case. After *Eastern*, SSA reviewed the circumstances of all assigned operators and, for those that SSA concluded were similarly situated to Eastern, SSA declared the operators' beneficiary assignments void. Some of these beneficiaries could be reassigned, but many could not. Thus, *Eastern*, which was not decided until the Combined Fund's sixth plan year, significantly increased the number of unassigned beneficiaries, and it did so as of February 1, 1993, the date on which the Combined Fund began providing benefits.

To deal with these many changes in beneficiary assignments and the number of unassigned beneficiaries, the Combined Fund uses an accounting method called "inception billing," which annually adjusts for the retroactive effect of

changes in beneficiary assignments. *Pardee*, 269 F.3d at 434. Operators relieved of assignments receive credits or refunds going back to the first plan year, and beneficiaries that become unassigned as a result of successful challenges to the assignments or court decisions increase the unassigned beneficiary premium account under Section 9704(d) of the Coal Act for all prior years. All operators prior premium assessments are recalculated accordingly, and a consolidated bill (including the adjusted version of all prior bills and payments) is issued at the beginning of each new plan year. *Dixie Fuel* is simply wrong, therefore, in asserting that the Coal Act's premium assessment and calculation system will not work if the number of unassigned beneficiaries is not determined once and for all by September 30, 1993. To the contrary, as the Fourth Circuit recognized in *Pardee*, the Coal Act explicitly contemplates annual readjustments of operator liability based on changes in assignments, and these adjustments cannot be reconciled with the static system envisioned by *Dixie Fuel*. 269 F.3d at 434.

In addition, as the Fourth Circuit also recognized, adoption of *Dixie Fuel*'s approach "would create irrational distinctions in the SSA's power to reevaluate its initial assignments." *Pardee*, 269 F.3d at 435. For example, if SSA erroneously concluded before October 1, 1993 that a beneficiary was unassignable, but later received information connecting the beneficiary to an extant employer, SSA would be barred from making the appropriate assignment. That would not be so, however, if SSA initially assigned a beneficiary to the wrong coal operator. *Dixie Fuel* would permit reassignment of beneficiaries who were initially assigned to the wrong operator, but it would forbid "reassignment" of beneficiaries who were initially assigned to no operator. Congress could not have "intended the allocation of liability to rest on such a hollow distinction." *Pardee*, 269 F.3d at 435.

The Sixth Circuit's statutory construction in *Dixie Fuel,* if it could have been anticipated by SSA, would have presented the agency with a "perverse incentive to make a timely 'rough cut.'" *Pardee*, 269 F.3d at 435 n.15. SSA would have avoided the entire issue here if, realizing by September 30, 1993 that it could not complete the assignment process by that day, it had simply assigned *all* not-yet-assigned beneficiaries to coal company X or Y or Z. These assignments then could have been reviewed at a later date and the appropriate corrections could have been made. But, because SSA had no reason to believe that it would be stripped of authority to make beneficiary assignments after September 30, 1993, it sought to comply with Congress' intent that it make determinations based on "reasonable inferences" and "accurate data," 138 Cong. Rec. 34,004 (1992). Given Congress' chief concern of assigning as many beneficiaries as possible to the most responsible parties, Congress could not have intended that SSA be forever barred from assigning the beneficiaries at issue to the proper operators simply because SSA was behind schedule or because SSA did not uncover on its own relevant information regarding corporate or employment relationships that only came to light in later administrative appeals involving beneficiaries already assigned.

Nothing in the Coal Act suggests that Congress intended the October 1, 1993 date in Section 9706(a) to protect whatever interest signatory operators (or related persons) might have in prompt assignment of beneficiaries. Neither the Sixth Circuit nor Bellaire has identified any evidence that Congress was concerned with repose or mathematical certainty for the signatory operators. To the contrary, the definitions of responsible parties are broad, and may reach back many years in the employment relationship. 26 U.S.C. § 9706(a)(1) - (3); 26 U.S.C. § 9701(5) and (7). *Pardee*, 269 F.3d at 434 (the Coal Act subordinates coal operators' interests, if any, to overriding interest in ensuring

fair and accurate assignments). Further, as noted above, the Coal Act expressly authorizes SSA to make assignments to operators well after the October 1, 1993 date, as part of the appeals process through which original beneficiary assignments may be rescinded and the affected beneficiaries assigned to new operators. 26 U.S.C. § 9706(f). Consequently, a signatory operator can receive its very first beneficiary assignment well after October 1, 1993, even under the *Dixie Fuel* rationale. Thus, there is no basis, let alone a sufficient basis, to infer that Congress intended the statutory date to be inflexible, so as to create a "safe-harbor" for responsible signatory operators like Bellaire.

In sum, although Congress indicated its intent that beneficiary assignments be made promptly, it did not specify a consequence for SSA's non-compliance with the statutory date, and there is no indication in any provision of the Coal Act of an intent or reason for cutting off SSA's power to make assignments on or after October 1, 1993. The lack of a specified consequence in the statutory text should be dispositive of SSA's authority to make assignments on or after the statutory date. *See James Daniel Good*, 510 U.S. at 63. Because "the text and reasonable inferences from it give a clear answer" in favor of SSA, that should be "the end of the matter." *Brown*, 513 U.S. at 120.

III. OTHER INDICIA OF CONGRESSIONAL INTENT CONFIRM THAT SSA RETAINED AUTHORITY TO MAKE ORIGINAL ASSIGNMENTS AFTER THE STATUTORY DATE.

Although the text of the Coal Act, properly read in light of this Court's precedents, is sufficient to demonstrate the error in *Dixie Fuel*, the Coal Act's legislative history, historical context, purpose, and public policy implications all point to the same conclusion. The Senate's proposed Conference Report for the Coal Act and other legislative

materials show that Congress intended "unassigned beneficiaries" to mean only Combined Fund orphans. Provision after provision of the report reflects the Coal Act's fundamental principle that employers should pay for the health care of their own former employees and that "unassigned" beneficiaries are those not assignable under the statutory criteria:

> The method of assignment of eligible beneficiaries was the source of much debate and controversy prior to the Conference Agreement. The conferees intend that the largest possible number of beneficiaries in the Plans be assigned to a specific or designated company. Under the statute, each eligible beneficiary shall be assigned in the following order . . . . Finally, if no operator remains in business under the formulations described above, that retiree becomes an unassigned beneficiary.

138 Cong. Rec. 34,003 (1992).

> As a practical matter, not all beneficiaries can be assigned to a specific last signatory operator, related person or assigned operator for payment purposes. This is because in some instances, none of those persons remain in business, even as defined to include non-mining related businesses. Thus, provisions are made for unassigned beneficiary premiums. In each plan year each assigned operator will pay a premium earmarked to cover the health costs of these unassigned beneficiaries.

Id.

> The essence of the Conference Agreement is that those companies which employed the retirees in question, and thereby benefited from their services, will be assigned responsibility for providing health care benefits promised in their various collective

> bargaining agreements. This will be accomplished through a formulation designed to allocate the greatest number of beneficiaries in the Plans to a prior responsible operator.

Id. at 34,001.

> [T]he Conference Agreement's overriding purpose is to find and designate a specific obligor for as many beneficiaries in the Plans as possible.

Id. at 34,002.

> The Conference Report's purpose is to assure that any beneficiary, once assigned, remains the responsibility of a particular operator, and that the number of unassigned beneficiaries is kept to an absolute minimum.

Id. at 34,003.

The remarks of Senator Rockefeller, the primary sponsor of the legislation, confirm this understanding:

> The key difference [in this bill] relates to the funding of health benefits for the orphan retirees. In general, these are the people whose companies are out of business.
>
> ***
>
> The approach of this legislation rests on the important principle that responsible companies should bear the cost of these health benefits. It is a rational approach. It is a fair approach.

138 Cong. Rec. 20,118 (1992). Senator Ford, a co-sponsor, agreed:

> We have closed the new orphan fund so to limit the problem and ensure a long-term solution. We have attempted to allocate costs according to the principle

> that those most responsible should bear the greatest proportion of the costs.

Id. at 20,120. Senator Wallop placed in the record the *CRS Report*, which analyzed the use of transfers from the AML Funds to finance benefits for "orphan retirees." *Id.* at 34,001 (remarks of Sen. Wallop), 34,004-11 (*CRS Report*).

The Coal Act's financing structure was carefully considered, extensively debated, and determined by Congress to be the best allocation of responsibility and best balance of competing interests and limited resources. As noted by Senator Rockefeller, "[t]he approach of the current legislation was not lightly arrived at. Lengthy and difficult negotiations were required because of the myriad of conflicting interests in our nationwide coal industry." 138 Cong. Rec. 20,118 (1992). It would be odd indeed if Congress, having created such a careful balancing of interests, would have chosen at the same time to cut off SSA's authority on October 1, 1993, which, as events transpired, was less than 80 days after SSA received funding from Congress to commence the beneficiary assignment process.[36/]

In contrast, the legislative history relating to the October 1, 1993 date is unremarkable.[37/] It does not indicate

---

36/ Supplemental Appropriations Act of 1993, H.R. 2118, Pub. L. No. 103-50, Ch. V, 139 Cong. Rec. D. 765; *see Brock,* 476 U.S. at 265 ("It would be very odd if Congress had implemented [its intent to discover and rectify abuses under federal training program] by cutting off the Secretary's authority to correct abuses just 120 days after learning of them.").

37/ *See, e.g.*, 138 Cong. Rec. 34,003 ("The amount of the unassigned beneficiary premium payable by each assigned operator will be calculated on the number of beneficiaries assignable to each operator as of October 1, 1993."); *id.* ("In the first plan year the Secretary of HHS will review the work history of each beneficiary and will prepare the assigned operator allocations which are required to be made by October

that the date is jurisdictional. Nor does it indicate any reason why Congress would choose to make it so. "Conspicuously absent" from the Coal Act's text and legislative history "is any reference to the possibility that the [October 1, 1993] provision might convey rights on" the signatory operators. *See Brock,* 476 U.S. at 264. To the contrary, the Coal Act's history evidences an antipathy toward coal operators' past "dumping" of retired coal miners and a clear intent to make as many beneficiary assignments as possible and to hold the most responsible persons liable. Senator Rockefeller's remarks sum up this point:

> We must stop the past practice in which existing companies dump their responsibilities onto the companies that have faithfully kept their commitments.

138 Cong. Rec. 20,118 (1992).

Furthermore, voiding all assignments made on or after October 1, 1993 would undermine Congress' express purpose of stabilizing funding of a *private* health care benefit plan. *See* 26 U.S.C. § 9701 (historical note). Leaving thousands of beneficiaries unassigned despite the ability to match them with employers under Section 9706(a)'s criteria will create a windfall for certain coal operators at the expense of other operators, as well as the general public. *Pardee*, 269 F.3d at 437; *see Montalvo-Murillo*, 495 U.S. at 720 (when it is inevitable that delays will occur despite diligent efforts "there is no reason to bestow upon the defendant a windfall and to visit upon the Government and the citizens a severe penalty"). Although premiums for the assigned beneficiaries

---

1, 1993."). The Fourth Circuit ruled that the phrase "*assignable*...as of October 1, 1993" provided significant evidence that assignments could be made after that date. *Pardee*, 269 F.3d at 436; *see also id.* ("the paucity of references to this 'dead-line' is conspicuous and compelling").

are paid entirely by coal operators, the costs of providing health care for unassigned beneficiaries are not. Beginning with the Combined Fund's fiscal year 1996 (October 1, 1995 to September 30, 1996), the Secretary of the Interior makes annual transfers of interest that has accrued on the AML Fund to the Combined Fund to defray the cost of health care for unassigned beneficiaries. 30 U.S.C. § 1232(h). The funds thus transferred may be used only to pay for unassigned beneficiary expenses. *See* 26 U.S.C. § 9705(b); 30 U.S.C. § 1232(h); 138 Cong. Rec. 34,004 (1992). If those funds prove insufficient, the Coal Act provides for the assessment of additional premiums agair.st assigned operators based on their proportionate share of the assigned beneficiaries. 26 U.S.C. § 9704(d) & (f); *Pardee*, 269 F.3d at 438. To date, the transfers from the AML Fund, which as of November 30, 2000, have amounted to more than $336 million, have been sufficient to cover the unassigned beneficiary premiums. *Pardee*, 269 F.3d at 438. "Given the high cost of health care for retired miners, and the likely diminution of the fund's interest earning capacity," however, "the interest may not last for long." *Sigmon*, 122 S. Ct. at 961 n.5 (Stevens, J., dissenting).

The federal government's portion of the AML Fund interest not transferred to the Combined Fund remains available to pay for the environmental clean-up of abandoned mines (or for whatever other projects Congress may allocate the funds). 30 U.S.C. § 1231(b)(5) and (c); *see also* 30 U.S.C. § 1232(g)(4)(A). The funding for mine reclamation projects follows a strict order of priority that first targets projects to protect the public "from extreme danger" at abandoned mine sites. *See* 30 U.S.C. § 1233(a)(1); 30 U.S.C. § 1233(a)(2) - (5) (ranking additional priorities); *see also Pardee*, 269 F.3d at 438 n.19 ("magnitude of nation's reclamation needs is alarming"). If the number of unassigned beneficiaries is artificially inflated and greater costs are absorbed by the AML Fund, rather than by the responsible

coal companies to which Congress intended the beneficiaries to be assigned, the result will redound to the public's detriment by reducing the sums available in the AML Fund for other public purposes. *See CRS Report* at 138 Cong. Rec. 34,004-11 (1992). Although Congress authorized AML Fund transfers, it was based on the understanding that the Fund would be used "solely and exclusively" for unassigned beneficiaries, *id.* at 34,004, and that unassigned beneficiaries would be kept to "an absolute minimum," *id.* at 34,003. It is highly unlikely that Congress would intend the AML Fund interest to be depleted unnecessarily due simply to SSA's delay. There is no evidence that the Congress that enacted the Coal Act had any such intent. *See Pardee*, 269 F.3d at 438.

IV. DEFERENCE IS DUE TO SSA'S INTERPRETATION OF "UNASSIGNED BENEFICIARIES" TO INCLUDE ONLY COMBINED FUND ORPHANS.

At a minimum, the relevant Coal Act provisions are ambiguous, and deference is due to SSA's reasonable interpretation of Section 9706(a) and the term "unassigned beneficiary." Congress delegated to SSA the duty to carry out the assignment process, 26 U.S.C. § 9706(a), to notify assigned operators of their obligations, 26 U.S.C. § 9706(e)(2), to review assignment determinations for error, 26 U.S.C. § 9706(f), and to calculate the per beneficiary premium for each plan year, 26 U.S.C. § 9704(b)(2). These directions imply a delegation to SSA of the authority to determine the proper assignment of beneficiaries to signatory operators as well as definitions of general applicability, such as "unassigned beneficiary."[38/]

38/ *See* 138 Cong. Rec. 34,003 (1992) ("[I]t is intended under the statute that the Secretary have authority to promulgate regulations governing the method by which determinations of the assigned operator

To carry out its duties, SSA promulgated regulations in compliance with the Administrative Procedure Act. *See* 58 Fed. Reg. 52914 (1993). Although SSA's regulations do not define "unassigned beneficiary," they do state explicitly that beneficiaries will be treated as unassigned "[i]f no assigned operator can be identified." 20 C.F.R. § 442.606(f). In addition, SSA has clearly and consistently expressed its opinion on the issue. After a considered review, SSA concluded that *Dixie Fuel* was wrongly decided and that the agency would continue to litigate the issue in the Sixth Circuit and other jurisdictions.

In these circumstances, SSA's interpretation of the Coal Act is entitled to deference under *Chevron v. Natural Resources Defense Council*, 467 U.S. 837 (1984).[39/] The only remaining question is whether SSA's interpretation is reasonable. *Id.* at 843.

SSA's interpretation and implementation are plainly reasonable and consistent with the aims of the Coal Act, as the foregoing analysis of the text, legislative history, and historical context shows. Interpreting "unassigned

---

will be made and setting out the review procedures available to an assigned operator once such determinations are made."); *Association of Bituminous Contractors, Inc. v. Apfel*, 156 F.3d 1246, 1251 (D.C. Cir. 1998) (granting *Chevron*-deference to SSA's interpretation of "coal industry," which term is not defined by Coal Act).

39/ *See United States v. Mead Corp.*, 121 S. Ct. 2164, 2175 (2001) (*Chevron*-deference due when Congress delegated authority to agency and agency interpretation was promulgated under that authority); *Pension Benefit Guaranty Corp. v. LTV Corp.*, 496 U.S. 633, 647-52 (1990) (*Chevron*-deference to PBGC's interpretation of ERISA's requirements for restoring a terminated plan, which interpretation was reflected in agency's notice of restoration); *NationsBank of N.C. v. Variable Annuity Life Ins. Co.*, 513 U.S. 251 (1995) (*Chevron*-deference to Comptroller of Currency's letter to bank granting request to act as agent in sale of annuities).

beneficiaries" to include only Combined Fund orphans, and finding no evidence in the statute that Congress intended SSA to halt its assignment work on October 1, 1993, SSA reasonably proceeded to make original assignments after that date. That SSA's interpretation is fully reasonable is verified by the Fourth Circuit's identical conclusion:

> Congress intended the status of individual beneficiaries to depend not on the vicissitudes of bureaucratic action, but instead on the merits, *i.e.*, whether an extant operator could be identified and held responsible.

Pardee, 269 F.3d at 438. Accordingly, original assignments made on or after October 1, 1993 are valid, and Bellaire should be held responsible for the 270 beneficiaries at issue here.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

John R. Mooney
Elizabeth A. Saindon
MOONEY, GREEN, BAKER
& SAINDON, P.C.
1920 L Street, N.W., Suite 400
Washington, D.C. 20036
(202) 783-0010

David W. Allen
Jonathan Sokolow
Office of the General Counsel
UMWA HEALTH &
RETIREMENT FUNDS
2121 K Street, N.W.
Washington, D.C. 20037
(202) 521-2220

Peter Buscemi
Counsel of Record
Anne Brafford
MORGAN, LEWIS &
BOCKIUS LLP
1111 Pennsylvania Ave., N.W.
Washington, D.C. 20004
(202) 739-3000

April 8, 2002

Nos. 01-705 & 01-715

Supreme Court, U.S.
FILED
JUN 7 2002
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

JO ANNE B. BARNHART,
COMMISSIONER OF SOCIAL SECURITY,
Petitioner,

v.

PEABODY COAL COMPANY, *et al.*,
Respondents.

MICHAEL H. HOLLAND, *et al.*,
Petitioners,

v.

BELLAIRE CORPORATION, *et al.*,
Respondents.

On Writs of Certiorari to the United States Court of Appeals for the Sixth Circuit

---

BRIEF FOR RESPONDENTS PEABODY COAL COMPANY AND EASTERN ASSOCIATED COAL CORP.

JOHN R. WOODRUM
W. GREGORY MOTT
HEENAN, ALTHEN & ROLES LLP
1110 Vermont Avenue, N.W.
Suite 400
Washington, D.C. 20005
(202) 887-0800

JOHN G. ROBERTS, JR.*
LORANE F. HEBERT
HOGAN & HARTSON L.L.P.
555 Thirteenth Street, N.W.
Washington, D.C. 20004
(202) 637-5810

*Counsel of Record

Counsel for Respondents

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

BEST AVAILABLE COPY

70795

QUESTION PRESENTED

Whether the Sixth Circuit correctly held that the Commissioner of Social Security lacks the authority to make initial assignments of beneficiaries under the Coal Industry Retiree Health Benefit Act of 1992, 26 U.S.C. §§ 9701 *et seq.*, on or after October 1, 1993, when the statute explicitly provides that the Commissioner "*shall, before October 1, 1993*, assign each coal industry retiree who is an eligible beneficiary to a signatory operator which (or any related person with respect to which) remains in business," 26 U.S.C. § 9706(a) (emphasis added), and further provides a detailed mechanism for financing benefits for unassigned beneficiaries.

PARTIES TO THE PROCEEDINGS AND RULE 29.6 STATEMENT

Peabody Coal Company ("Peabody") and Eastern Associated Coal Corp. ("EACC") are respondents in No. 01-705. Peabody and EACC are wholly-owned subsidiaries of Peabody Energy Corporation, a publicly held corporation.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
PARTIES TO THE PROCEEDINGS AND RULE 29.6 STATEMENT	ii
TABLE OF AUTHORITIES	vi
STATUTORY PROVISION INVOLVED	1
INTRODUCTION	2
STATEMENT OF THE CASE	4
Historical Background	4
The Coal Act	7
Post-Enactment Developments	12
The *Dixie Fuel* Decision	14
Proceedings Below	15
SUMMARY OF ARGUMENT	16
ARGUMENT	20
THE COMMISSIONER LACKS AUTHORITY UNDER THE COAL ACT TO MAKE INITIAL ASSIGNMENTS ON OR AFTER OCTOBER 1, 1993	20
A. The Plain Language Of The Coal Act Demonstrates That Congress Intended That The Commissioner "Shall" Make Initial Assignments "Before October 1, 1993"—Not After	21

TABLE OF CONTENTS—Continued

Page

B. The Statutory Scheme Confirms That Congress Meant What It Said In Section 9706(a) 22

1. The October 1, 1993 Date Has Significance Throughout The Act 23

2. Congress Specified How To Handle Beneficiaries Who Were Not Assigned Pursuant To Section 9706(a) 25

3. Other Provisions Of The Act Confirm That Congress Intended The Process Of Making Initial Assignments To End By October 1, 1993 32

4. Congress Gave The Agency Sufficient Time To Do The Job Congress Envisioned 37

C. The *Brock* v. *Pierce County* Line Of Decisions Does Not Compel A Different Reading Of The Coal Act 39

D. The Subsequent Enactment Of A Supplemental Appropriations Measure Does Not Demonstrate That Congress Intended The Commissioner To Make Initial Assignments In Perpetuity, Contrary To The Language Of Section 9706(a) 44

E. The Commissioner's Construction Of Her Authority To Make Initial Assignments On Or After October 1, 1993 Is Not Entitled To Deference 46

TABLE OF CONTENTS—Continued

Page

CONCLUSION 50

STATUTORY ADDENDUM

TABLE OF AUTHORITIES

Page

Cases:

Adams Fruit Co. v. *Barrett*, 494 U.S. 638 (1990) 48

Alabama v. *Bozeman*, 533 U.S. 146 (2001) 21, 22, 35-36, 40

Anderson v. *Yungkau*, 329 U.S. 482 (1947) 21

Barnhart v. *Sigmon Coal Co.*, 122 S. Ct. 941 (2002) ..... *passim*

Barnhart v. *Walton*, 122 S. Ct. 1265 (2002) 48

Brock v. *Pierce County*, 476 U.S. 253 (1986) ..... *passim*

Christensen v. *Harris County*, 529 U.S. 576 (2000) 36

Dixie Fuel Co. v. *Commissioner of Soc. Sec.*, 171 F.3d 1052 (6th Cir. 1999) ..... *passim*

Eastern Enters. v. *Apfel*, 524 U.S. 498 (1998) 4, 9

EEOC v. *Arabian American Oil Co.*, 499 U.S. 244 (1991) 49

Escoe v. *Zerbst*, 295 U.S. 490 (1935) 21

Federal Maritime Comm'n v. *Seatrain Lines, Inc.*, 411 U.S. 726 (1973) 48

General Motors Corp. v. *United States*, 496 U.S. 530 (1990) 40

Gray-Bey v. *United States*, 201 F.3d 866 (7th Cir. 2000) 28

Holland v. *Pardee Coal Co.*, 269 F.3d 424 (2001), *pet. for cert. pending*, No. 01-1366 ..... 16, 31

TABLE OF AUTHORITIES—Continued

Page

Cases:

Holmes Group, Inc. v. *Vornado Air Circulation Sys., Inc.*, No. 01-408 (U.S. June 3, 2002) 27

INS v. *Cardoza-Fonseca*, 480 U.S. 421 (1987) 49

Lexecon Inc. v. *Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26 (1998) 21-22

Miller v. *French*, 530 U.S. 327 (2000) 21

Regions Hosp. v. *Shalala*, 522 U.S. 448 (1998) 43

Rock Island, A. & L. R.R. v. *United States*, 254 U.S. 141 (1920) 4

Rodriguez v. *United States*, 480 U.S. 522 (1987) 28

Russello v. *United States*, 464 U.S. 16 (1983) 33, 34

Skidmore v. *Swift & Co.*, 323 U.S. 134 (1944) 46, 48

South Dakota v. *Yankton Sioux Tribe*, 522 U.S. 329 (1998) 45

TRW Inc. v. *Andrews*, 122 S. Ct. 441 (2001) 34

United States v. *James Daniel Good Real Property*, 510 U.S. 43 (1993) 40, 41, 42, 43

United States v. *Mead Corp.*, 533 U.S. 218 (2001) 46, 48

United States v. *Monsanto*, 491 U.S. 600 (1989) 22, 45

TABLE OF AUTHORITIES—Continued

Page

Cases:

United States v. *Montalvo-Murillo*, 495 U.S. 711 (1990) 40, 41, 42, 43

Watt v. *Alaska*, 451 U.S. 259 (1981) 49

Whitman v. *American Trucking Ass'n*, 531 U.S. 457 (2001) 48

Statutory Provisions:

5 U.S.C. § 706(1) 44

26 U.S.C. §§ 9701 *et seq.* 1

26 U.S.C. § 9701 37

26 U.S.C. § 9701(b)(1) 8

26 U.S.C. § 9701(c)(1) 8

26 U.S.C. § 9701(c)(2)(A) 8, 25

26 U.S.C. § 9701(c)(3) 10

26 U.S.C. § 9701(c)(5) 8

26 U.S.C. § 9701(c)(7) 8

26 U.S.C. § 9702(a)(1) 7

26 U.S.C. § 9702(a)(2) 7, 9

26 U.S.C. § 9702(b) 24

26 U.S.C. § 9702(b)(1)(B) 24

26 U.S.C. § 9702(b)(3)(B) 24

26 U.S.C. § 9702(c) 9

26 U.S.C. § 9703(b)(1) 7

26 U.S.C. § 9703(f)(1) 7

TABLE OF AUTHORITIES—Continued

Page

Statutory Provisions:

26 U.S.C. § 9703(f)(2) 7

26 U.S.C. § 9704(a) 8, 10, 25

26 U.S.C. § 9704(a)(1) 8

26 U.S.C. § 9704(a)(3) 11, 26

26 U.S.C. § 9704(d) 11, 23, 25, 26

26 U.S.C. § 9704(f) 35

26 U.S.C. § 9704(f)(1) ..... *passim*

26 U.S.C. § 9704(f)(2) 11

26 U.S.C. § 9704(f)(2)(A) 11, 15, 18, 34

26 U.S.C. § 9704(f)(2)(B) ..... *passim*

26 U.S.C. § 9704(g)(1) 10

26 U.S.C. § 9704(i)(1)(A) 10

26 U.S.C. § 9704(i)(1)(D)(i) 10

26 U.S.C. § 9705(a) 10

26 U.S.C. § 9705(a)(1) 12

26 U.S.C. § 9705(a)(3) 12

26 U.S.C. § 9705(b)(1) 12

26 U.S.C. § 9705(b)(2) 12, 24, 25, 31

26 U.S.C. § 9706(a) ..... *passim*

26 U.S.C. §§ 9706(a)(1)-(3) 8, 9

26 U.S.C. § 9706(c) 10, 38

26 U.S.C. § 9706(d) 10, 38

TABLE OF AUTHORITIES—Continued

Page

Statutory Provisions:

26 U.S.C. § 9706(f) ..... *passim*

26 U.S.C. § 9706(f)(1) 9

26 U.S.C. § 9706(f)(2) 9

26 U.S.C. § 9706(f)(3)(A) 9

26 U.S.C. § 9706(f)(3)(A)(ii) 32-33

30 U.S.C. § 932(h) 47

30 U.S.C. § 1232(a) 12, 30

30 U.S.C. § 1232(h) 12

30 U.S.C. § 1232(h)(2)(A) 12

30 U.S.C. § 1232(h)(2)(B) 12

30 U.S.C. § 1232(h)(3)(A) 12

30 U.S.C. § 1232(h)(3)(B) 12

30 U.S.C. § 1232(h)(4) 30

Energy Policy Act of 1992, Pub. L. No. 102-486, 106 Stat. 2776 ..... *passim*

§ 19142(a)(2), 106 Stat. 3037 ..... 7, 28

§ 9706(a), 106 Stat. 3047 12

Omnibus Budget Reconciliation Act of 1990, Pub. L. No. 101-508, § 6002(e), 104 Stat. 1388 30

Social Security Independence and Program Improvements Act of 1994, Pub. L. No. 103-296, § 108(h)(9)(B), 108 Stat. 1464 13

Supplemental Appropriations Act of 1993, Pub. L. No. 103-50, ch. V, 107 Stat. 241 ..... 13, 45

TABLE OF AUTHORITIES—Continued

Page

Legislative Materials:

138 Cong. Rec. 20,120 (July 29, 1992) 6-7

138 Cong. Rec. 34,003 (Oct. 8, 1992) 27

138 Cong. Rec. 34,005 (Oct. 8, 1992) 7

138 Cong. Rec. 34,006 (Oct. 8, 1992) 30

138 Cong. Rec. 34,033 (Oct. 8, 1992) 6

146 Cong. Rec. S3835 (May 10, 2000) 8

Agency Management of the Implementation of the Coal Act: Hearing Before the Senate Subcomm. on Oversight of Government Management, Restructuring and the District of Columbia of the Comm. on Governmental Affairs, 105th Cong. 19 (1998) 47

Coal Industry Retiree Health Benefit Act of 1992: Hearing Before the Subcomm. on Oversight of the House Ways and Means Comm., 104th Cong. 23 (1995) ..... *passim*

Coal Miners and Widows Health Protection Act of 2000, S. 2538, 106th Cong. § 3 (2000) 46

Departments of Labor, Health and Human Services, Education, and Related Agencies Appropriations for 1994: Hearings Before a Subcomm. of the House Comm. on Appropriations, 103d Cong. 158 (1993) ..... *passim*

Provisions Relating to the Health Benefits of Retired Coal Miners: Hearing Before the House Ways and Means Comm., 103d Cong. 26 (1993) ..... *passim*

TABLE OF AUTHORITIES—Continued

	Page
Other Authorities:	
58 Fed. Reg. 50,950 (Sept. 29, 1993)	49
58 Fed. Reg. 52,914 (Oct. 13, 1993)	49
Black's Law Dictionary 1375 (6th ed. 1990)	22
General Accounting Office, *Employee Benefits: Financing Health Benefits of Retired Coal Miners* (July 22, 1992)	10
Secretary of Labor's Advisory Commission on United Mine Workers of America Retiree Health Benefits, *Coal Commission Report: A Report to the Secretary of Labor and the American People* (1990)	6, 11
14 U.S. Op. Off. Legal Counsel 57 (1990)	41

IN THE

Supreme Court of the United States

Nos. 01-705 & 01-715

JO ANNE B. BARNHART,
COMMISSIONER OF SOCIAL SECURITY,
Petitioner,

v.

PEABODY COAL COMPANY, *et al.*,
Respondents.

MICHAEL H. HOLLAND, *et al.*,
Petitioners,

v.

BELLAIRE CORPORATION, *et al.*,
Respondents.

On Writs of Certiorari to the United States Court of Appeals for the Sixth Circuit

---

BRIEF FOR RESPONDENTS PEABODY COAL COMPANY AND EASTERN ASSOCIATED COAL CORP.

STATUTORY PROVISION INVOLVED

Section 9706(a) of the Coal Industry Retiree Health Benefit Act of 1992 ("Coal Act"), 26 U.S.C. §§ 9701 *et seq.*, pro-

vides in pertinent part: "[T]he Commissioner of Social Security shall, before October 1, 1993, assign each coal industry retiree who is an eligible beneficiary to a signatory operator which (or any related person with respect to which) remains in business * * *." 26 U.S.C. § 9706(a). Other pertinent provisions of the Act are set forth in the statutory addendum.

INTRODUCTION

Congress enacted the Coal Act in 1992 to ensure the continued provision of health benefits to retired miners who had been promised lifetime benefits by their former employers, many of whom were no longer in business. To do so, the Coal Act established a fund financed in part by premiums assessed against coal operators that formerly employed the miners, as well as against certain "related persons." Those coal operators and related persons would be responsible for the costs of providing benefits to beneficiaries of the fund "assigned" to them under certain criteria set out in the Coal Act. Benefits for "unassigned" beneficiaries would be financed by alternative means, including transfers of interest from a government fund also financed by assessments against coal operators and, if necessary, a pro rata assessment on operators and related persons responsible for assigned beneficiaries. Thus, no matter whether beneficiaries were assigned or unassigned under the Act, *all* beneficiaries would be entitled to the same benefits, and the fund would not stand to lose a single dollar in revenue.

The Commissioner of the Social Security Administration ("SSA") was delegated the responsibility of assigning beneficiaries to coal operators and related persons. Their premiums were to be initially assessed on the basis of all assignments as of October 1, 1993, the date on which the fund's first full plan year commenced. To ensure that this financing scheme was in place by then, Congress directed that the Commissioner "shall, before October 1, 1993," make

assignments to coal operators and related persons. Pursuant to that statutory mandate, SSA made the assignments, and later represented to Congress that the agency had "completed the process of making the initial assignment decisions by October 1, 1993, as required by law." *Coal Industry Retiree Health Benefit Act of 1992: Hearing Before the Subcomm. on Oversight of the House Ways and Means Comm.*, 104th Cong. 23 (1995) ("*1995 Coal Act Hearing*") (Principal Deputy Commissioner Lawrence H. Thompson).

Nearly two years after SSA had completed the assignment process—and just shortly after it had represented that much to Congress—the agency suddenly began to assign to operators and related persons beneficiaries it had previously not assigned. Years later, the agency was still making such initial assignments. Whereas the agency had previously understood the Act's October 1, 1993 deadline to be mandatory, it now believed it could continue to make initial assignments of beneficiaries in perpetuity. But Congress did not tell the Commissioner to assign beneficiaries "when you get around to it." Congress said "before October 1, 1993." Congress also explained how to handle beneficiaries who were not assigned, ascribed significance to the October 1, 1993 date in other provisions of the Act, and specified only one situation in which new assignments could be made after October 1, 1993, which does not apply in this case. The Commissioner nonetheless reads "shall, before October 1, 1993," to mean "may, before or after October 1, 1993, and for as long as she likes, but at least through September 1997." *See* J.A. 47, 110, 112, 117.

With such a claim what is at stake in this case moves beyond whether an operator may reduce exposure for assigned beneficiaries while increasing exposure for unassigned beneficiaries, or the extent to which a different fund also financed by coal operators may be used to pay benefits. What is at stake becomes nothing less than whether the Federal Government must abide by the rule of law.

We learn early on that "[m]en must turn square corners when they deal with the Government." *Rock Island, A. & L. R.R.* v. *United States*, 254 U.S. 141, 143 (1920). Certainly none of us would expect a sympathetic hearing from the Federal Government if we failed to meet a statutory deadline—especially one in Title 26 of the United States Code. By the same token, we are entitled to expect that the Government itself will abide by the rules established by Congress. Congress said, in words with no inherent ambiguity, that the Commissioner "shall, before October 1, 1993," make assignments pursuant to the criteria in the Act. 26 U.S.C. § 9706(a). The principle that the Commissioner urges this Court to accept—that even such plain statutory provisions are simply, as far as the Government is concerned, hortatory admonitions that it can disregard according to its convenience—is one that ought to give pause. The Federal Government is, to be sure, very big, and its agents are assuredly very busy. Those are two of the best reasons to insist that the Government abide by the law.

STATEMENT OF THE CASE

Historical Background. Congress enacted the Coal Act in response to a crisis that threatened the stability of the Nation's coal industry.[1] For years, health benefits for retired miners had been provided through multi-employer health plans established pursuant to collective bargaining agreements. Over time, however, the plans began to experience serious financial difficulties. By the time Congress stepped in to address the problem, the continued viability of the plans was in jeopardy, and the coal industry faced the prospect of a calamitous strike.

The plans themselves had their genesis in one of the most disruptive strikes in our Nation's history. In 1946, a breakdown in negotiations between coal operators and the United Mine Workers of America ("UMWA") over health benefits for miners led to a nationwide strike, prompting President Truman to declare a national emergency and issue an Executive Order directing the seizure of the Nation's coal mines. Negotiations between the Federal Government and the UMWA produced the historic Krug-Lewis Agreement, which ended the strike and led to the creation of health and retirement benefit funds for miners. From then on, retiree health benefits were provided through multi-employer health plans established pursuant to a series of National Bituminous Coal Wage Agreements ("NBCWAs") negotiated by the UMWA and the coal industry.[2]

The plans were funded by contributions from coal operators, and continued to provide benefits to eligible retirees even after their former employers stopped contributing to the plans. Such benefits were financed by the remaining participating coal operators, even though those operators and the retirees whose benefits they financed might never have had an employment relationship. By the late 1980s, the plans had run into serious financial trouble as health care costs increased and coal operators stopped contributing to the plans because they no longer employed union workers or had left the coal business altogether.

In 1989, the UMWA led a ten-month strike against Pittston Coal Company, a major coal operator, after it refused to sign the 1988 NBCWA. The dispute prompted the intervention of

[1] The history of the Coal Act is reviewed in this Court's decisions in *Eastern Enterprises* v. *Apfel*, 524 U.S. 498 (1998) and *Barnhart* v. *Sigmon Coal Co.*, 122 S. Ct. 941 (2002).

[2] The first NBCWA to establish a benefit plan was the 1947 NBCWA. The 1950 NBCWA created a new benefit plan, which remained in effect until 1974. The 1974 NBCWA established two new health benefit plans—the 1950 UMWA Benefit Plan, which provided health benefits to miners who retired before January 1, 1976, and the 1974 UMWA Benefit Plan, which provided health benefits to active miners and those who retired on or after January 1, 1976. When the Coal Act was passed in 1992 those two plans were still in effect pursuant to the 1988 NBCWA, which was due to expire on February 1, 1993.

the Secretary of Labor, who announced as part of its settlement the creation of the Advisory Commission on UMWA Retiree Health Benefits (the "Coal Commission") to "review and make recommendations concerning the financial crisis confronting the 1950 and 1974 [UMWA Benefit Plans]." Secretary of Labor's Advisory Commission on UMWA Retiree Health Benefits, *Coal Commission Report: A Report to the Secretary of Labor and the American People* ("*Coal Comm'n Report*") 1 (1990). After months of study, the Commission concluded that "a statutory obligation to contribute to the plans should be imposed on current and former signatories to the [NBCWAs]." *Id.* at vii-viii. The Commission warned that a "crisis could come as early as 1993" when the 1988 NBCWA was due to expire, and that "[t]he time to deal with the problem is now." *Id.* at 3-4.

Congress heeded the call. In March 1992, as part of a larger tax bill, Congress passed an earlier version of the Coal Act which would have provided for the financing of benefits through premiums assessed against signatories to the 1978 or any subsequent NBCWA and an industry-wide tax on future coal production. The entire bill, however, was vetoed by President Bush. By this time, the expiration of the 1988 NBCWA on February 1, 1993 loomed on the horizon. Congress continued to seek a legislative solution, well aware that the failure to achieve one could result in the interruption of benefits to miners and another massive strike.[3] Finally, on

[3] *See, e.g.*, 138 Cong. Rec. 34,005 (Oct. 8, 1992) (submission of Sen. Wallop, Congressional Research Service, *Coal Industry: Use of Abandoned Mine Reclamation Fund Monies for UMWA "Orphan Retiree" Health Benefits* (1992) ("*CRS Report*") (noting that failure to find a solution before the expiration of the 1988 NBCWA "could lead to a strike by the miners and/or a refusal by [signatory] employers to continue to support health benefits previously promised to retired miners and dependents"); 138 Cong. Rec. 34,033 (Oct. 8, 1992) (Sen. Rockefeller) (legislation necessary to "avert disruption in the coalfields and the consequent threat to commerce and the national interest"); 138 Cong. Rec. 20,120 (July 29, 1992) (Sen. Ford) (proposed legislation ensures "a stable coal industry that will not face the heartache and trauma of a nationwide coal strike next February").

October 24, 1992, "amidst a maelstrom of contract negotiations, litigation, strike threats, * * * and high pressure lobbying, not to mention wide disagreements among [its] Members," Congress enacted the Coal Act. *Sigmon Coal*, 122 S. Ct. at 947-948 (footnotes omitted).

The Coal Act. Congress enacted the Coal Act "to secure the stability of interstate commerce" by "stabiliz[ing] plan funding and allow[ing] for the provision of health care benefits to [coal industry] retirees." Pub. L. No. 102-486, § 19142(a)(2), 106 Stat. 2776, 3037 (1992). To accomplish those objectives, the Coal Act merged the existing multi-employer plans (the 1950 and 1974 UMWA Benefit Plans) into a new private multi-employer plan known as the UMWA Combined Benefit Fund (the "Combined Fund"). *See* 26 U.S.C. §§ 9702(a)(1), (2).

The Combined Fund provides "substantially the same" health benefits that retirees and their dependents received under the 1950 and 1974 UMWA Benefit Plans to each "eligible beneficiary." *Id.* § 9703(b)(1).[4] An "eligible beneficiary" is defined as a coal industry retiree who, on July 20, 1992, was receiving benefits under the 1950 or 1974 UMWA Benefit Plan, or an individual who, on that date, was receiving such benefits by reason of a relationship to such a retiree. *Id.* §§ 9703(f)(1), (2). Coal industry workers retiring after July 20, 1992 are not eligible for benefits under the Fund. Thus, at its inception, the Combined Fund had a fixed

[4] Because the vast majority of beneficiaries are also eligible for the federal Medicare program, the Combined Fund essentially functions as a "Medigap" policy, providing prescription drugs and other benefits not available under Medicare. *See* 138 Cong. Rec. 34,005 (1992) (*CRS Report*).

number of beneficiaries, which would steadily decline over the years.[5]

The Combined Fund is financed in part by annual premiums assessed against "assigned operators," *i.e.*, coal operators that signed a coal wage agreement requiring the provision of health benefits to retirees or contributions to the 1950 or 1974 UMWA Benefit Plans, and that "conduct[] or derive[] revenue from any business activity, whether or not in the coal industry." *Id.* §§ 9701(b)(1), (c)(1), (5), (7), 9704(a), 9706(a). If an assigned operator is no longer involved in any business activity, premiums may be assessed against "related persons," including businesses or corporations under common control, or successors in interest to such entities. *Id.* §§ 9701(c)(2)(A), 9706(a). Assigned operators (and related persons) are assessed annual premiums for each retiree (and dependents) assigned to them by the Commissioner of Social Security under a three-tier allocation system set out in Section 9706(a) of the Act. *Id.* §§ 9704(a)(1), 9706(a)(1)-(3).

Under the Act's allocation system, the Commissioner was first to attempt to assign a beneficiary to a coal operator that was in business, had signed a coal wage agreement in 1978 or thereafter, and was the most recent signatory operator to have employed the miner in the coal industry for at least two years (or to a "related person" of such an operator). If an assignment could not be made under those criteria, the Commissioner was to attempt to assign the beneficiary to a coal operator that was in business, had signed a coal wage agreement in 1978 or thereafter, and was the most recent signatory operator to have employed the miner in the coal

[5] At its inception, the Combined Fund had approximately 114,000 beneficiaries. Fed. Pet. 25 & n.17. As of October 2001, the Fund had approximately 54,000 beneficiaries—less than half the number it had about ten years ago. *See* Peabody Opp. 8 n.5; *see also* 146 Cong. Rec. S3835 (May 10, 2000) (Sen. Rockefeller) ("There are now only about 65,000 miners and retirees remaining in the [Combined] Fund * * *. Their average age is 78 years old, and more than 45% of the population is over 80 years.").

industry (or to a related person). Finally, if an assignment could not be made under those criteria, the Commissioner was to attempt to assign the beneficiary to a coal operator that was in business and had employed the miner in the coal industry longer than any other coal operator prior to the effective date of the 1978 NBCWA (or to a related person). *See id.* §§ 9706(a)(1)-(3).[6]

Assigned operators were to be initially assessed premiums based on assignments as of October 1, 1993, the date on which the Fund's first full year was scheduled to commence. *See id.* § 9702(c). To ensure that assignments were completed by that date, Congress specifically directed that "the Commissioner of Social Security *shall, before October 1, 1993*, assign each coal industry retiree who is an eligible beneficiary to a signatory operator which (or any related person with respect to which) remains in business," pursuant to the Act's allocation system. *Id.* § 9706(a) (emphasis added).[7]

[6] An operator or related person assigned a beneficiary under the Act has 30 days to request "detailed information as to the work history of the beneficiary and the basis of the assignment." 26 U.S.C. § 9706(f)(1). Within 30 days of the receipt of such information, the assigned operator may request review of the assignment by the Commissioner. *Id.* § 9706(f)(2). If the Commissioner determines that the assignment was in error, the assigned operator is entitled to a credit or refund of all premiums paid with respect to such assignment, and the beneficiary's record is reviewed for reassignment under the Act's allocation system. *Id.* § 9706(f)(3)(A).

In *Eastern Enterprises*, this Court declared unconstitutional assignments made under the third tier to operators that had not signed the 1974 or any subsequent NBCWA, on the ground that those operators had not made a commitment to provide lifetime benefits to retired miners and their dependents. *See* 524 U.S. at 529-537 (plurality); *id.* at 550 (Kennedy, J., concurring in the judgment and dissenting in part).

[7] The Combined Fund's first plan "year" began on February 1, 1993—the expiration date of the 1988 NBCWA—and ran until September 30, 1993. *See* 26 U.S.C. §§ 9702(a)(2), (c). Benefits

Congress went to some length to facilitate the assignment process, directing the 1950 and 1974 UMWA Benefit Plans to provide to SSA, within 20 days of the statute's enactment, a list of the names and social security numbers of each eligible beneficiary (including each deceased beneficiary if any other individual was a beneficiary by reason of a relationship to such deceased beneficiary) and, to the extent possible, the names of their former employers. *See id.* § 9706(c). In addition, Congress directed the Plans to provide to SSA, where ascertainable from plan records, the names of all parties to be assigned beneficiaries under Section 9706(a). Congress further directed all other agencies, as well as the trustees of the Combined Fund and all of the UMWA Plans, to cooperate fully with SSA in providing information that would enable SSA to complete the assignment process. *See id.* § 9706(d).[8]

---

provided by the Fund during this interim period were to be initially financed by a $70 million transfer from the overfunded 1950 UMWA Pension Plan, as well as by contributions from signatories to the 1988 NBCWA or an agreement providing similar benefits. *See id.* §§ 9701(c)(3), 9704(i)(1)(A), 9705(a). Once the assignment process under Section 9706(a) was completed, assigned operators would be assessed premiums for the Combined Fund's interim period and first full year, and the 1988 agreement operators would be entitled to a credit against their premiums in the amount of contributions made during the interim period. *See id.* §§ 9704(a), (i)(1)(D)(i). Premiums for the interim period and first full plan year were to be assessed and paid during the first full plan year beginning October 1, 1993. *See id.* § 9704(g)(1).

[8] The 1950 and 1974 UMWA Benefit Plans possessed substantial information concerning the employment history of the Fund's beneficiaries. The Plans had conducted a census in 1990 of the status of the last employer of each retiree, and had broken down those employers into categories of pre- and post-1978 NBCWA signatory operators, much like the Coal Act. *See* General Accounting Office, *Employee Benefits: Financing Health Benefits of Retired Coal Miners* 8-9 (July 22, 1992). That census also identified certain companies related to coal operators that had gone out of business. *See id.* In addition, members of the Bituminous Coal Operators' Association ("BCOA")—including respondents

Congress also made provisions for financing the benefits of those beneficiaries not assigned under Section 9706(a). The Coal Act requires the calculation of an "unassigned beneficiaries premium" that may be assessed annually against assigned operators. *See id.* §§ 9704(a)(3), (d). An assigned operator's unassigned beneficiaries premium is equal to the operator's "applicable percentage"—defined as its percentage of total assigned beneficiaries "determined on the basis of assignments as of October 1, 1993," *id.* § 9704(f)(1)—of the per beneficiary premium for the plan year multiplied by "the number of eligible beneficiaries who are not assigned under section 9706" for the plan year. *Id.* § 9704(d). In other words, an assigned operator's unassigned beneficiaries premium is based on its proportionate share of all beneficiaries assigned "as of October 1, 1993." *Id.* § 9704(f)(1).[9]

The Act also designates two other sources of financing for the health benefits of unassigned beneficiaries. For each of the Fund's first three years, Congress directed that $70 million be transferred from the overfunded 1950 UMWA Pension Plan,[10] and that a portion of those transfers be used

---

Peabody and EACC—facilitated the assignment process by acknowledging responsibility for some 15,000 retirees.

[9] The Act provides that an assigned operator's "applicable percentage" may be annually adjusted by making "changes to the assignments as of October 1, 1993" in two specified circumstances. *Id.* § 9704(f)(2). First, "such assignments" may be modified to reflect any changes as a result of the appeals process set out in Section 9706(f). *Id.* § 9704(f)(2)(A). Second, an assigned operator's "applicable percentage" may be reduced to reflect a change in the total number of assigned eligible beneficiaries because an assigned operator (or related person) has ceased to do business, which results in that operator's assignees being placed in the unassigned pool. *Id.* § 9704(f)(2)(B). There is no other provision for "changes to the assignments as of October 1, 1993."

[10] The Coal Commission reported in 1990 that the 1950 UMWA Pension Plan (established pursuant to the 1974 NBCWA) was overfunded by $237 million. *See Coal Comm'n Report* at 2. Like the UMWA Benefit Plans, the 1950 UMWA Pension Plan was

to "proportionately reduce the unassigned beneficiary premium" of each assigned operator. *See id.* §§ 9705(a)(1), (3). For each plan year thereafter, Congress authorized the annual transfer of interest earned by the Department of the Interior's Abandoned Mine Reclamation Fund (the "AML Fund")[11] to likewise be used to "proportionately reduce the unassigned beneficiary premium" of each assigned operator. *See id.* §§ 9705(b)(1), (2); 30 U.S.C. § 1232(h).[12] Thus, as a practical matter, operators may be assessed an unassigned beneficiaries premium only if such transfers prove insufficient to cover the costs of providing health benefits to unassigned beneficiaries. To date, such transfers have been sufficient, and assigned operators have never been assessed an unassigned beneficiaries premium.

Post-Enactment Developments. Although Congress gave SSA nearly a year to make assignments under the Coal Act, SSA delayed the commencement of that process because the agency concluded that it did not have the appropriate funds to carry out the responsibilities delegated by Congress.[13] On

---

funded by contributions from coal operators, including respondents Peabody and EACC.

[11] The AML Fund is financed by assessments against coal operators for each ton of coal produced. *See* 30 U.S.C. § 1232(a). Respondents Peabody and EACC both contribute to the AML Fund.

[12] Such transfers may not exceed actual expenditures on behalf of unassigned beneficiaries. *See* 30 U.S.C. § 1232(h)(3)(A). In the event interest earned by the AML Fund in any fiscal year is less than $70 million, Congress has authorized the transfer of interest earned by the Fund between September 30, 1992, and October 1, 1995, to make up the difference. *See id.* §§ 1232(h)(2)(A), (B), (3)(B).

[13] As originally enacted, the Coal Act directed the Secretary of Health and Human Services to make the required assignments. *See* Pub. L. No. 102-486, § 9706(a), 106 Stat. 2776, 3047. Upon the establishment of SSA as an independent agency in 1994, the Coal Act was amended with the substitution of "Commissioner of Social Security" for "Secretary of Health and Human Services."

July 2, 1993, Congress provided a supplemental appropriation of $10 million for SSA to make initial assignments, review assignments under the Act's administrative review process, and calculate the per beneficiary premium for each plan year. *See* Supplemental Appropriations Act of 1993, Pub. L. No. 103-50, ch. V, 107 Stat. 241, 254 (appropriating funds "to carry out sections 9704 and 9706").

On September 9, 1993—only weeks before the statutory deadline—the then-Acting Commissioner of SSA informed a congressional committee that SSA "[is] making excellent progress with the assignment process" and "fully expect[s] [to] meet [its] statutory responsibility to * * * complete the assignment process by October 1, 1993." *Provisions Relating to the Health Benefits of Retired Coal Miners: Hearing Before the House Ways and Means Comm.*, 103d Cong. 26 (1993) (Lawrence H. Thompson) ("*1993 Coal Act Hearing*"). *See also id.* at 23 (SSA "making good progress and fully expect[s] to meet the statutory due date for carrying out [its] assigned tasks under the Act").

Testifying before Congress in June 1995, the Principal Deputy (and former Acting) Commissioner reported that "SSA *completed* the process of making the initial assignment decisions *by October 1, 1993, as required by law.*" *1995 Coal Act Hearing* at 23 (Lawrence H. Thompson) (emphases added). *See also id.* at 19 ("We have also completed the process of making the initial assignments. As was required by law, we completed that by October, 1993."); *id.* at 20 (SSA had "carried out [its] responsibilities of calculating the premiums and the initial assignment to the mine operators in the timeframe contemplated by the statute"). At the end of that process, 20,036 miners who had not been assigned under

---

See Social Security Independence and Program Improvements Act of 1994, Pub. L. No. 103-296, § 108(h)(9)(B), 108 Stat. 1464, 1487.

the Act's criteria were deemed "unassigned." *1993 Coal Act Hearing* at 41.

Yet no sooner had SSA reported to Congress that it had "completed" the initial assignment process "by October 1, 1993, as required by law," when the agency suddenly—and retroactively—began to make assignments of beneficiaries it had previously not assigned. Indeed, as late as September 1997—four years after the statutory deadline—SSA was still making assignments from the unassigned pool, retroactive to October 1, 1993. *See, e.g.*, J.A. 47, 110, 112, 117.

The *Dixie Fuel* Decision. In *Dixie Fuel Co.* v. *Commissioner of Social Security*, 171 F.3d 1052 (6th Cir. 1999) (Pet. App. 27a), a coal operator that received more than 50 initial assignments of beneficiaries after October 1, 1993 brought suit challenging SSA's authority to make initial assignments after the statutory deadline. After examining the Coal Act's "entire statutory scheme," the Sixth Circuit concluded that the Commissioner had no authority to make initial assignments on or after October 1, 1993, and held that the assignments were invalid. Pet. App. 45a.

The Sixth Circuit noted that the language of the Coal Act "is plain on its face." *Id.* at 43a. Congress directed that the Commissioner "*shall, before October 1, 1993*, assign each coal industry retiree * * * to a signatory operator which (or any related person with respect to which) remains in business." *Id.* (emphasis in original). This Court, the Sixth Circuit observed, "has held in any number of contexts that 'shall' is 'explicitly mandatory' language." *Id.* (citing cases).

The Sixth Circuit noted that in *Brock* v. *Pierce County*, 476 U.S. 253 (1986), this Court held that " 'the mere use of the word "shall" * * * standing alone' was not sufficient to terminate the power of the Secretary of Labor to recover misused funds after the expiration of the statutory period within which the Secretary was to act." *Id.* at 44a (quoting *Pierce County*, 476 U.S. at 262) (alteration in original). The

Sixth Circuit concluded, however, that the use of "shall" in Section 9706(a) "is not a 'mere use * * * standing alone.' " *Id.* at 45a. "No provision of the Coal Act so much as hints that the October 1, 1993 date is not a deadline." *Id.*

To the contrary, the court held, "the entire statutory scheme" of the Coal Act "reflects Congress's intent that all assignments be completed by October 1, 1993." *Id.* For example, "the calculation of the obligation of every assigned operator for payment of unassigned beneficiary premiums is dependent upon the completion of the assignment of beneficiaries by October 1, 1993." *Id.* at 47a. The statute "expressly provides for making adjustments beyond that date"—where an assigned operator successfully challenges an assignment pursuant to the appeals process set out in Section 9706(f) or where an assigned operator goes out of business, *see* 26 U.S.C. §§ 9704(f)(2)(A), (B)—but "those adjustments are all premised on the assignments' having been completed before October 1, 1993." Pet. App. 47a. Thus, the court held, the Coal Act's "statutory scheme simply is not comparable to that addressed by the Court in *Brock* v. *Pierce County*." *Id.*

Moreover, the court observed, the Coal Act does not "present the kind of situation that concerned the Court in *Pierce County*, namely a lack of consequences resulting from the agency's failure to act within the timeframe of the statute." *Id.* Here, "the consequence flowing from the failure of the Commissioner to make [initial] assignments before October 1, 1993, is clear from the plain language of the statute: the eligible beneficiaries who were not assigned [by October 1, 1993] are the *unassigned beneficiaries*." *Id.* (emphasis in original).

Proceedings Below. Respondents Peabody and EACC were assigned 330 beneficiaries after October 1, 1993 whom "SSA initially determined * * * would have to be deemed unassigned." Fed. Pet. 12. *See, e.g.*, J.A. 34, 36-47. Re-

spondents accordingly brought suit against the Commissioner, seeking invalidation of the assignments under the Sixth Circuit's decision in *Dixie Fuel*. The District Court granted summary judgment in their favor, voiding the assignments and enjoining the Commissioner from making further initial assignments to them. *See* Pet. App. 7a-8a. The Commissioner appealed to the Sixth Circuit and petitioned for initial hearing en banc for the purpose of reconsidering *Dixie Fuel*. The Sixth Circuit denied the petition and subsequently affirmed, explaining that the court had "already held that the Commissioner lacks [the] authority" to make initial assignments after October 1, 1993. *Id.* at 2a.

In *Holland* v. *Pardee Coal Co.*, 269 F.3d 424 (2001), *pet. for cert. pending*, No. 01-1366, a divided panel of the Fourth Circuit reached the opposite conclusion. This Court subsequently granted certiorari in this case. 122 S. Ct. 918 (2002).

SUMMARY OF ARGUMENT

A. The Coal Act provides that "the Commissioner of Social Security *shall, before October 1, 1993*, assign each coal industry retiree who is an eligible beneficiary to a signatory operator which (or any related person with respect to which) remains in business." 26 U.S.C. § 9706(a) (emphasis added). In choosing that language, Congress could not have made its intent clearer. Congress said the Commissioner "shall" make assignments "before October 1, 1993"—not after. As this Court reiterated just months ago in construing the same statute, "[w]e have stated time and again that courts must presume that a legislature says in a statute what it means and means in a statute what it says there." *Sigmon Coal*, 122 S. Ct. at 956 (quotation omitted).

B. Congress should be taken at its word. As the Sixth Circuit recognized in *Dixie Fuel*, "[n]o provision of the Coal Act so much as hints that the October 1, 1993, date is not a deadline." Pet. App. 45a. Indeed, the "entire statutory scheme" hinges on that date. *Id.* As of that date, the Act's

interim financing scheme would come to an end, and the Combined Fund would look to assigned operators (and related persons) to finance the costs of providing benefits to the Fund's beneficiaries. Benefits for assigned beneficiaries would be financed by premiums paid by the assigned operators for each beneficiary assigned to them. In the event that transfers from the AML Fund proved insufficient to provide benefits to unassigned beneficiaries, assigned operators (and related persons) would be allocated a portion of the remaining costs based on their pro rata share of all beneficiaries assigned "as of October 1, 1993." 26 U.S.C. § 9704(f)(1).

Thus, as of October 1, 1993, a funding mechanism would be in place to ensure the continued provision of benefits to *all* beneficiaries. Placing a deadline on the initial assignment process, and then treating beneficiaries not assigned by that deadline pursuant to the express provisions for unassigned beneficiaries, makes sense and is consistent with Congress's general approach under the Act. The Coal Act does not require a perfect match between each beneficiary and the coal operator most responsible for that beneficiary. Given that approach, it is not surprising that Congress would not have wanted the Commissioner to engage in an interminable and costly effort to track down a responsible party for every last beneficiary. At some point, the effort to match up parties is not worth the candle, and responsible parties need to move on with some certainty concerning their exposure under the Act. That point, Congress decided, was October 1, 1993.

Limiting the quest to match beneficiaries and operators makes particular sense since an unassigned beneficiary loses no coverage due to that fact, and the costs for such beneficiaries are covered by another fund also established through assessments on operators, or by pro rata assessments on assigned operators (and related persons). Coal operators end up paying one way or another, and Congress could reasonably have decided that the Commissioner should devote only

so much time and energy to determining which way it should be in the case of each particular beneficiary.

Several key provisions confirm that this was Congress's intent. In Section 9706(f), Congress specified only one circumstance in which it intended the Commissioner to make assignments on or after October 1, 1993—where an assignment is voided pursuant to the Act's administrative review process. The absence of a similar provision granting the Commissioner the authority to make initial assignments after that date strongly suggests that Congress meant what it said in Section 9706(a)—that the Commissioner "shall" make those assignments "before October 1, 1993."

Similarly, in Section 9704(f), Congress specified only two circumstances in which annual adjustments are to be made to an assigned operator's "applicable percentage"—that is, an assigned operator's percentage of total assigned beneficiaries, "determined on the basis of assignments as of October 1, 1993." 26 U.S.C.§ 9704(f)(1). Those circumstances are when adjustments are necessary: (1) to reflect changes to the assignments "as of October 1, 1993" resulting from the appeals process set out in Section 9706(f), *id.* § 9704(f)(2)(A), and (2) to reflect changes to the assignments "as of October 1, 1993" resulting from an assigned operator's (or related person's) cessation of business. *Id.* § 9704(f)(2)(B). If Congress had intended the Commissioner to continue to make initial assignments on or after October 1, 1993, Congress surely would have provided for annual adjustments to an assigned operator's "applicable percentage" because of those assignments. Again, the lack of any such provision strongly suggests that Congress meant what it said in Section 9706(a).

Moreover, as Section 9704(f)(2)(B) makes clear, when an assigned operator (or related person) ceases to do business, its beneficiaries go into the "unassigned" pool. The fact that Congress did not provide for reassignment to another operator (or related person)—no matter how easy it might be to identify the most responsible party next in line under the Act's criteria—amply demonstrates that, subject to the appeals process to correct assignments made in error, Congress envisioned a one-time assignment process and did not intend to pursue its objective of assigning beneficiaries to responsible parties after October 1, 1993.

C. Petitioners' reliance on the *Brock* v. *Pierce County* line of authority is misplaced. Unlike the statutes involved in those cases, the Coal Act plainly specifies a consequence for the failure to act by its statutory deadline—all beneficiaries not assigned by that date are treated pursuant to the Act's express provisions for unassigned beneficiaries. Moreover, in the *Pierce County* line of decisions, strict adherence to the statutory deadline would have prevented an agency or government official from protecting or vindicating important public rights. Not so here. As the Commissioner herself recognizes, the initial assignment process "take[s] place under a statutory framework that is designed to establish relationships among *private* parties." Br. 21 (emphasis in original). Further, none of the decisions in the *Pierce County* line involved specific dates critical to the implementation and operation of the statutory scheme. Finally, no alternative remedy was available for the Commissioner's failure to adhere to the statutory deadline, as there was with respect to the failures to observe time limits in *Pierce County* and its progeny.

D. The Commissioner argues that Congress's subsequent appropriation to SSA of funds to remain available "until expended" somehow demonstrates that the Congress that enacted the Coal Act intended the Commissioner to make initial assignments on or after October 1, 1993. Nothing about that appropriation suggests anything of the kind. As the Commissioner herself concedes, that appropriation was intended for SSA not only to make initial assignments, but also to conduct the appeals process and calculate the per

beneficiary premium for each plan year—responsibilities that SSA would continue to carry out *after* the deadline. In this case, the most telling thing Congress has done since enacting the Coal Act is what it has not done—enact a bill introduced to amend the Act to overturn the result in *Dixie Fuel*.

E. Finally, petitioners briefly argue that the Court should defer to the Commissioner's current view that she is not bound by the October 1, 1993 deadline for initial assignments. Even if Section 9706(a) were ambiguous, the Commissioner's "interpretation" of her authority to act beyond that deadline would deserve no deference. Congress conferred no law-making authority on the Commissioner in the Coal Act, and her current position that she may make initial assignments beyond the deadline is not the product of any exercise of such authority. Moreover, the Commissioner is attempting to evade a statutory provision that constrains her authority; deference to her view of such a provision is particularly inappropriate. The Commissioner's current interpretation of the Coal Act's assignment deadline also flatly contradicts SSA's earlier views, as represented to Congress. The agency's shifting position on its authority under the Coal Act blunts any persuasive force its current litigating position might otherwise carry.

ARGUMENT

THE COMMISSIONER LACKS AUTHORITY UNDER THE COAL ACT TO MAKE INITIAL ASSIGNMENTS ON OR AFTER OCTOBER 1, 1993.

After having previously represented to Congress that SSA had "completed the process of making the initial assignment decisions by October 1, 1993, as required by law," *1995 Coal Act Hearing* at 23, the Commissioner now maintains that the agency failed to complete all assignments by the deadline, Br. 10 n.8, and that, notwithstanding the Coal Act's unambiguous command that the Commissioner "shall" assign beneficiaries "before October 1, 1993," the agency retains the

authority to continue making initial assignments beyond that date. But regardless of whether the agency in fact failed to complete the assignment process by the statutory deadline or instead simply decided to revisit the "unassigned" pool after that date, the Commissioner simply has no authority under the Coal Act to make initial assignments to coal operators and related persons on or after October 1, 1993. To the contrary, as the Sixth Circuit correctly held in *Dixie Fuel*, "the entire statutory scheme" of the Coal Act "reflects Congress's intent that all assignments be completed by October 1, 1993." Pet. App. 45a.

A. The Plain Language Of The Coal Act Demonstrates That Congress Intended That The Commissioner "Shall" Make Initial Assignments "Before October 1, 1993"—Not After.

As with any statute, the starting point for interpreting the Coal Act is the language of the statute itself. *See Sigmon Coal*, 122 S. Ct. at 950 ("As in all statutory construction cases, we begin with the language of the statute."). As the Sixth Circuit observed in *Dixie Fuel*, the language of the Coal Act is "plain on its face." Pet. App. 43a. The Act clearly and unambiguously provides that the Commissioner "*shall, before October 1, 1993*, assign each coal industry retiree who is an eligible beneficiary to a signatory operator which (or any related person with respect to which) remains in business." 26 U.S.C. § 9706(a) (emphasis added).

This Court has long and recently held that " '[t]he word "shall" is ordinarily "[t]he language of command." ' " *Alabama* v. *Bozeman*, 533 U.S. 146, 153 (2001) (quoting *Anderson* v. *Yungkau*, 329 U.S. 482, 485 (1947) (quoting *Escoe* v. *Zerbst*, 295 U.S. 490, 493 (1935))). *See, e.g.*, *Miller* v. *French*, 530 U.S. 327, 337 (2000) ("statutory command that such a motion 'shall operate as a stay during the [specified time] period' indicates that the stay is *mandatory*") (alteration and emphasis in original); *Lexecon Inc.* v. *Milberg*

Weiss Bershad Hynes & Lerach, 523 U.S. 26, 35 (1998) ("the mandatory 'shall' * * * normally creates an obligation impervious to judicial discretion"); *United States* v. *Monsanto*, 491 U.S. 600, 607 (1989) ("Congress could not have chosen stronger words" than " 'shall order' " to "express its intent that forfeiture be mandatory"). *See also* Black's Law Dictionary 1375 (6th ed. 1990) ("As used in statutes * * * [the] word ["shall"] is generally imperative or mandatory"); Pet. App. 43a-44a (citing cases). Read in that light, the statutory language could not be more straightforward. Congress intended the Commissioner to complete initial assignments "before October 1, 1993." And if Congress intended the Commissioner to do so "before" that date, it necessarily follows that Congress did not intend the Commissioner to make initial assignments *after* that date. *See Bozeman*, 533 U.S. at 153 ("the language of the [statute] militates against an implicit exception, for it is absolute").

B. The Statutory Scheme Confirms That Congress Meant What It Said In Section 9706(a).

Petitioners claim they have no "quarrel" with the notion that Congress intended that all assignments be completed by October 1, 1993. Tr. Br. 24. *See also* Tr. Br. 30; Fed. Br. 18-19, 23 n.12. In their view, however, the Act's command that the Commissioner "shall" assign beneficiaries "before October 1, 1993" was merely a hortatory spur to action, not an absolute deadline, because the Act does not explicitly state that the Commissioner lacks the authority to make initial assignments beyond that date. *See* Fed. Br. 20; Tr. Br. 26. The Commissioner asserts, for instance, that "Congress could have expressly provided that, if assignments were not completed by October 1, 1993, the Commissioner would have no further authority to assign a Coal Act beneficiary to a signatory operator or related person." Br. 20. By the same token, however, Congress could just as easily have instructed the Commissioner to continue to make initial assignments until all beneficiaries were assigned—if that had been what

Congress intended. But Congress need not resort to tautologies to make its intent clear. As the Sixth Circuit recognized in *Dixie Fuel*, "[n]o provision of the Coal Act so much as hints that the October 1, 1993, date is not a deadline." Pet. App. 45a. Rather, the "entire statutory scheme" demonstrates that Congress never intended the Commissioner to make initial assignments on or after October 1, 1993. *Id.*

1. The October 1, 1993 Date Has Significance Throughout The Act.

The October 1, 1993 date is the linchpin of the Coal Act's entire statutory scheme. The Combined Fund's first full year was scheduled to begin on October 1, 1993. As of that date, the Fund's interim financing scheme would come to an end, and assigned operators (and related persons) would be responsible for premiums to cover the costs of providing benefits to beneficiaries assigned to them. Of course, no premiums could be collected until beneficiaries were actually assigned. Thus, beneficiaries had to be assigned by October 1, 1993 to ensure adequate financing for their benefits. That financing was also necessary "to ensure that a definite end was placed to payments by 1988 signatories that had no individual retirees in the Combined Fund beneficiary pool and thus no long-term obligations against which [their] interim contributions could be credited." Fed. Br. 35-36.

As the Sixth Circuit noted in *Dixie Fuel*, "the calculation of the obligation of every assigned operator for payment of unassigned beneficiaries premiums is [also] dependent upon the completion of the assignment of beneficiaries by October 1, 1993." Pet. App. 47a. An assigned operator's unassigned beneficiaries premium is equal to its "applicable percentage" of the per beneficiary premium for the plan year multiplied by the number of unassigned beneficiaries. *See* 26 U.S.C. § 9704(d). An operator's "applicable percentage" is its percentage of total assigned beneficiaries, "determined on the

basis of assignments *as of October 1, 1993*." *Id.* § 9704(f)(1) (emphasis added).

The unassigned beneficiaries premium is the central component of the funding mechanism for unassigned beneficiaries. Although the Act provides for transfers of interest from the AML Fund to finance benefits for the unassigned beneficiaries—and to date assigned operators have never been assessed an unassigned beneficiaries premium—such transfers are intended to "be used to proportionately reduce the unassigned beneficiaries premium * * * of each assigned operator for the plan year in which transferred." *Id.* § 9705(b)(2). Thus, the Act specifically contemplates the calculation of unassigned beneficiaries premiums each year. And that calculation is predicated "on the basis of assignments as of October 1, 1993." *Id.* § 9704(f)(1).

The October 1, 1993 date also plays a key role in the administration of the Combined Fund. The Coal Act provides for the appointment of a board of trustees "as soon as practicable" after its enactment. *Id.* § 9702(b). One of those trustees was to be selected "by the three employers, other than the 1988 agreement operators, who have been assigned the greatest number of eligible beneficiaries." *Id.* § 9702(b)(1)(B). Those employers, of course, could not be known until October 1, 1993, when assignments were completed. Recognizing as much, Congress provided for an interim trustee to serve as a substitute until November 1, 1993. *Id.* § 9702(b)(3)(B). Congress necessarily assumed that the three employers with the most employees would be known by then—given the October 1, 1993 deadline for assignments—and that they could select a trustee in the intervening month.

In short, the October 1, 1993 date was critical to the implementation and operation of Coal Act's statutory scheme. Viewed in context, Congress's use of the word "shall" can

only mean that Congress did not intend the Commissioner to make initial assignments beyond that statutory deadline.

2. Congress Specified How To Handle Beneficiaries Who Were Not Assigned Pursuant To Section 9706(a).

This conclusion applies with even more force when the Act's provisions for unassigned beneficiaries are considered. Congress recognized that not all beneficiaries would be assigned under the statute's criteria by October 1, 1993, and designated sources for financing benefits for those unassigned. *See* 26 U.S.C. §§ 9704(a), (d), 9705(b)(2). Thus, at the end of the assignment process and the termination of SSA's initial assignment authority, a mechanism was in place to ensure the continued provision of benefits to all the Fund's beneficiaries.

Placing a deadline on how long the Commissioner may take to match up beneficiaries and operators under the Coal Act's criteria, and then treating beneficiaries not assigned by the statutory deadline pursuant to the provisions for "unassigned" beneficiaries, makes sense and is consistent with Congress's "rough justice" approach under the Act. The Coal Act does not create a scheme of perfect symmetry in which companies are required to finance the costs of providing benefits only to those beneficiaries with whom they had a former employment relationship or for whose benefits they are most responsible. Instead, Congress established a scheme where a coal operator that only briefly employed a retiree who worked much longer for another coal operator might be responsible for that retiree (and dependents), *see* § 9706(a); where companies that never employed a retiree or even engaged in the coal mining business might be responsible for retirees, *see* §§ 9701(c)(2)(A), 9706(a); and where companies might be responsible for a portion of the costs of providing

benefits to retirees not assigned to anyone else. *See* §§ 9704(a)(3), (d).[14]

Given this approach, it is not surprising that Congress would have wanted to place a time limit on the assignment process, rather than have SSA exhaust resources and spend unlimited tax dollars in an interminable effort to assign every last beneficiary to an operator (or related person). At some point, the effort to track down further matches is not worth the candle, and must come to an end so that all involved can move forward with some certainty concerning their liability. Putting a limit on the assignment process made sense since doing so did not mean that any beneficiary would be left out in the cold or that the Fund would lose one dollar. Funding for unassigned beneficiaries would still come, initially from transfers from the overfunded 1950 UMWA Pension Plan financed by coal operators, *see supra* n.10, and, subsequently, from transfers of interest from the AML Fund (also financed by coal operators) and, if necessary, on a pro rata basis from those operators assigned beneficiaries. In other words, operators were footing the bill one way or another, and Congress could reasonably decide that at some point it made no sense for the Commissioner to continue to devote time and energy to parsing which way it should be. That point was October 1, 1993.

The Commissioner argues that construing the Act to terminate her authority to make initial assignments as of October 1, 1993 would frustrate Congress's goal of assigning as many

[14] The Commissioner erroneously asserts that we have previously argued that "the fact that a particular beneficiary might be allocated to the wrong signatory * * * is of little significance." Br. 25 n.15. To the contrary, we have never suggested that it would be appropriate to assign a beneficiary to the wrong operator. Moreover, contrary to the Commissioner's suggestion (*id.*), beneficiaries are not "incorrectly" deemed unassigned when, as contemplated by Congress, they are treated as unassigned because they were not assigned to a signatory operator (or related person) under the Act's criteria by October 1, 1993.

beneficiaries as possible to the persons deemed most responsible for their benefits. *See* Br. 22-25.[15] But as this Court held just last Term in *Sigmon Coal*, Congress's objectives in enacting the Coal Act cannot be invoked to override the plain language of the statute. *See* 122 S. Ct. at 955-956; *see also Holmes Group, Inc.* v. *Vornado Air Circulation Sys., Inc.*, No. 01-408, slip op. at 7 (U.S. June 3, 2002) ("Our task here is not to determine what would further Congress's goal * * * but to determine what the words of the statute must fairly be understood to mean.").

At issue in *Sigmon Coal* was whether the Commissioner could make assignments to successors in interest of signatory operators when the statute by its terms only permitted assignments to successors in interest of "related persons." There, too, the Commissioner argued that construing the statute as written "would be contrary to Congress' stated purpose of ensuring that each Combined Fund beneficiary's health care costs is borne (if possible) by the person with the most direct responsibility for the beneficiary," as well as "Congress' 'overriding purpose' of avoiding a recurrence of the orphan retiree catastrophe." 122 S. Ct. at 954. Adhering to the plain language of the statute, this Court refused to "alter the text in order to satisfy the policy preferences of the Commissioner." *Id.* at 956.[16]

[15] The Commissioner relies on a statement submitted for the record by Senator Wallop as evidence of this goal, *see* Br. 22-23, but neglects to point out that the very same statement also noted that "[i]n the first plan year the Secretary of HHS will review the work history of each beneficiary and will prepare the assigned operator allocations *which are required to be made by October 1, 1993.*" 138 Cong. Rec. 34,003 (Oct. 8, 1992) (emphasis added).

[16] The dissenters in *Sigmon Coal* concluded that the majority's plain language reading led to absurd results. *See id.* at 956-958. Here, there is nothing absurd about treating beneficiaries not assigned by the statutory deadline pursuant to the provisions for unassigned beneficiaries.

The same result should follow here, where the Commissioner relies on the same "purpose" arguments to override the plain language of Section 9706(a). Seeing to it that the costs of providing health benefits to beneficiaries would be borne by the operators that had employed them was indeed one of the purposes of the Coal Act. "But no legislation pursues its purpose at all costs," and "it frustrates rather than effectuates legislative intent simplistically to assume that *whatever* furthers the statute's primary objective must be the law." *Rodriguez* v. *United States*, 480 U.S. 522, 525-526 (1987) (emphasis in original). Section 9704(f)(2)(B), for instance, confirms that Congress did not intend to pursue the purpose of assigning beneficiaries to responsible operators at all costs. That provision makes clear that when an assigned operator (or related person) ceases to do business, that operator's beneficiaries are not reassigned pursuant to the criteria set forth in Section 9706(a), no matter how easy it may be to identify the responsible operator next in line. Instead, those beneficiaries join the unassigned pool.

Here, Congress could readily decide that the perfect would be the enemy of the good—that the Commissioner should do as good a job as she could within the limited timeframe, and that it would be a waste of resources to attempt to align every last beneficiary with an operator or related person, no matter how long it took. *See, e.g.*, *Gray-Bey* v. *United States*, 201 F.3d 866, 872 (7th Cir. 2000) ("how to reconcile the quest for accuracy with other competing objectives is a legislative task, traditionally implemented through devices such as statutes of limitations and outer periods for action") (Easterbrook, J., dissenting).

In any event, the overriding purpose of the Coal Act was not to assign particular beneficiaries to particular operators, but to ensure the continued provision of benefits to miners and their dependents. § 19142(a)(2), 106 Stat. at 3037 (Coal Act enacted "to secure the stability of interstate commerce" by "stabiliz[ing] plan funding and allow[ing] for the provi-

sion of health care benefits to [coal industry] retirees"). Adhering to the plain language of Section 9706(a) in no way undermines that overriding purpose, because doing so results in no miner or dependent being denied benefits, and results in no adverse impact on the Combined Fund. Indeed, by ensuring the prompt determination of assignments and liabilities, the Act's deadline only furthers that objective.[17]

"Dissatisfied with the text of the statute," the Commissioner "seeks to amend [it] by appeal to the Judicial Branch." *Sigmon Coal*, 122 S. Ct. at 955-956. But as this Court explained in *Sigmon Coal*, "[d]issatisfaction * * * is often the cost of legislative compromise." *Id.* at 955. And that is particularly true with respect to the Coal Act. The statute's "delicate crafting" reflects a compromise among "highly interested parties attempting to pull the provisions in different directions." *Id.* at 956. "[A] change in any individual provision could have unraveled the whole." *Id.*

Parties to be held responsible for beneficiaries would want to know their liability under the Act sooner rather than later. A scheme that allowed SSA to make initial assignments in perpetuity would deny companies the opportunity to prepare adequately for Coal Act liabilities or engage in future business planning in light of such liabilities. Under such a scheme, companies could be—as they have been—completely blindsided by assignments made to them long after they had assumed that the initial assignment process was over. In "delicate[ly] crafting" the Coal Act, it would make sense for Congress to take such interests into account. *See, e.g., 1993 Coal Act Hearing* at 42 (Rep. Johnson)

[17] Even the Act's appeals process reflects Congress's intent to determine assignments and financial obligations once and for all, providing assigned operators (and related persons) only 30 days to request information concerning the basis of an assignment, and only another 30 days to request review. *See* 26 U.S.C. § 9706(f). By continuing to assign beneficiaries after the statutory deadline, the Commissioner has turned what was meant to be a short and speedy review process into an endless cycle of appeals.

(noting obligation to "make sure that companies, particularly small companies, have time to figure out their liability and prepare to deal with it").

Petitioners argue that treating all beneficiaries not assigned by October 1, 1993 as "unassigned" would inappropriately shift costs to the public and other assigned operators. *See* Fed. Br. 23-24; Tr. Br. 45. Benefits for unassigned beneficiaries, however, are not financed by general tax revenues, but by transfers of *interest* from the AML Fund, which is financed by assessments on coal operators. *See* 30 U.S.C. § 1232(a).[18] To date, those transfers have proved sufficient to cover the costs of providing benefits to unassigned beneficiaries.[19]

---

[18] The Commissioner suggests (Br. 24) that it would be inappropriate to use transfers from the AML Fund to finance the provision of health benefits to beneficiaries who could not be assigned by October 1, 1993 because that fund was established for other purposes. The transfers from the AML Fund, however, are transfers of *interest* earned by the Fund. In fact, prior to fiscal year 1992, the Fund did not even earn interest. *See* Omnibus Budget Reconciliation Act of 1990, Pub. L. No. 101-508, § 6002(e), 104 Stat. 1388, 1388-290; 138 Cong. Rec. 34,006 (*CRS Report*). In any event, Congress has determined that transfers of interest from the AML Fund are an appropriate source of financing for the Combined Fund. The fact that the Commissioner believes such funds might be better spent elsewhere is of no moment.

[19] There is no suggestion in petitioners' briefs that transfers from the AML Fund will not continue to be sufficient to finance the provision of benefits to unassigned beneficiaries. Indeed, those transfers are likely to prove sufficient as the overall beneficiary population continues to decline. The Commissioner contends (Br. 24 n.14) that the invalidation of assignments could require the Combined Fund to issue refunds for premiums collected in prior years. Even if that were true, the Coal Act's financing provisions ensure that the amount of any such refunds would be recovered from interest on the AML Fund or, if necessary, from pro rata unassigned beneficiary premiums. *See* 30 U.S.C. § 1232(h)(4) (authorizing adjustments to transfers to reflect underpayment in prior years).

Contrary to the Commissioner's suggestion (Br. 25 n.15), the allocation of a portion of the costs of providing benefits to unassigned beneficiaries among assigned operators (and related persons) would not lead to the "downward spiral" that occurred under the Combined Fund's predecessor plans. In the event that transfers from the AML Fund ever prove insufficient to cover the costs of providing benefits to unassigned beneficiaries, assigned operators would only be responsible for the shortfall, not the *entire* cost of financing those benefits. *See* 26 U.S.C. § 9705(b)(2). Moreover, as noted in *Sigmon Coal*, the Coal Act "broadly expanded the group of persons responsible for beneficiaries." 122 S. Ct. at 955 n.17. The Coal Act not only "reached back" to former signatories of the NBCWAs, but "reached out" to "related persons" of signatories and former signatories (including successors in interest of "related persons"). Thus, the costs of providing benefits to unassigned beneficiaries would be spread over a far greater number of responsible parties than under the predecessor plans. Under such circumstances, requiring assigned operators (and related persons) to bear a portion of the costs of providing benefits to beneficiaries who could not be assigned by October 1, 1993 is entirely consistent with Congress's general approach under the Act. *See Pardee*, 269 F.3d at 439 (Niemeyer, J., dissenting) (criticizing majority for "seek[ing] to adjust the financial equities of the Coal Act by judicial mandate").

It is no answer that the Act does not explicitly state that beneficiaries not assigned by October 1, 1993 are deemed "unassigned." The Act does not explicitly state that beneficiaries who could not be assigned under the three-tier allocation system for any other reason would be deemed "unassigned," either, yet no one would argue otherwise. In fact, the Act nowhere defines "unassigned beneficiary," but Congress clearly anticipated that there would be unassigned beneficiaries and made elaborate provisions for them. When those provisions are considered together with the Act's

directive that the Commissioner "shall" assign beneficiaries "before October 1, 1993," the most natural reading of the statute is that Congress intended that beneficiaries not assigned under the Act's allocation system by October 1, 1993 would be treated pursuant to the provisions for the "unassigned."

The Trustees claim that "[r]ead as a whole," the Coal Act uses the term "unassigned" to refer "only to beneficiaries who are *unassignable* because SSA was unable to identify an existing employer that satisfies Section 9706's criteria." Br. 31 (emphasis in original). *See also* Fed. Cert. Reply at 8 (arguing that Coal Act "provides only that a beneficiary shall be deemed unassigned if the Commissioner is unable to assign the beneficiary to a signatory operator *at all*") (emphasis in original). Congress could have used the term "unassignable" if that is what it meant. It did not. In any event, even if the October 1, 1993 deadline is put aside, a reading of the statute "as a whole" belies the Trustees' position. As noted, Section 9704(f)(2)(B) makes clear that when an assigned operator ceases to do business, its beneficiaries are not reassigned pursuant to the criteria set forth in Section 9706(a), no matter how "assignable" they may be. Thus, contrary to the Trustees' assertion, not all of the Act's "unassigned" beneficiaries are "unassignable."

3. Other Provisions Of The Act Confirm That Congress Intended The Process Of Making Initial Assignments To End By October 1, 1993.

Other provisions of the Coal Act confirm that Congress never intended the Commissioner to make initial assignments on or after October 1, 1993. In Section 9706(f), for instance, Congress established an administrative review process for challenging assignments. If the Commissioner determines that an assignment was made in error, the Act explicitly provides that "the Commissioner shall review the beneficiary's record for reassignment under [Section 9706(a)]." 26

U.S.C. § 9706(f)(3)(A)(ii). Thus, when Congress wanted to give the Commissioner continuing authority to make assignments after October 1, 1993, it knew how to do so. The absence of a similar provision granting the Commissioner the authority to make initial assignments after the statutory deadline is compelling evidence that Congress never intended the Commissioner to do so. Where " 'Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion' " *Sigmon Coal*, 122 S. Ct. at 951 (quoting *Russello* v. *United States*, 464 U.S. 16, 23 (1983)). *See also id.* ("Where Congress wanted to provide for successor liability in the Coal Act, it did so explicitly, as demonstrated by other sections in the Act * * *.").

The Commissioner nevertheless asserts that the Act "is not drafted in a way that suggests the authority to make new assignments after an appeal is an 'exception' to a general rule that assignments would otherwise be barred on or after October 1, 1993." Br. 29. But if the Commissioner in fact had authority to make assignments on or after October 1, 1993, there would have been no need for Congress expressly to provide for such authority in the case of assignments made in error in Section 9706(f).

The Commissioner also argues that, if Congress had intended reassignment under Section 9706(f) to be the only situation in which the Commissioner has authority to make assignments on or after October 1, 1993, it could have demonstrated that intent by stating, for instance, that "the Commissioner must make all assignments by October 1, 1993, 'except as provided' in the appeal provisions," or that "the Commissioner may make new assignments after an administrative appeal, 'notwithstanding' the [statutory] deadline." Br. 29-30. But there was no reason for Congress to insert excess verbiage into unambiguous statutory text. Congress unequivocally directed that the Commissioner

"*shall*" make assignments "before October 1, 1993." Once those assignments were made, assigned operators were given the opportunity to challenge assignments under the appeals process set out in Section 9706(f). In any case involving error, Congress specifically directed the Commissioner to review the beneficiary's record for reassignment. Nothing about any of those provisions suggests that the Commissioner has continuing authority to make assignments on or after October 1, 1993 for any reason other than the one specified in Section 9706(f).

Further evidence of Congress's intent is found in Section 9704(f), which defines the term "applicable percentage." As discussed, an assigned operator's "applicable percentage" is determined on the basis of assignments "*as of October 1, 1993*." 26 U.S.C. § 9704(f)(1) (emphasis added). The Act provides for annual adjustments beyond that date, but only in *two* circumstances: (1) to reflect changes to the assignments resulting from the appeals process, *id.* § 9704(f)(2)(A), and (2) to reflect changes to the assignments because an assigned operator (or related person) has ceased to do business. *Id.* § 9704(f)(2)(B). There is no subsection (f)(2)(C), providing for an adjustment to reflect initial assignments made on or after October 1, 1993. That, too, strongly suggests that Congress never intended the Commissioner to continue to make such assignments after that date. *See Sigmon Coal*, 122 S. Ct. at 951 (quoting *Russello*, 464 U.S. at 23). *See also TRW Inc.* v. *Andrews*, 122 S. Ct. 441, 447 (2001) ("Where Congress explicitly enumerates certain exceptions to a general prohibition, additional exceptions are not to be implied * * *.") (quotation omitted). It would be very strange indeed for Congress to intend for the Commissioner to continue to make initial assignments after October 1, 1993, yet fail to provide for annual adjustments to assigned operators' "applicable percentage" based on resulting changes to assignments "as of October 1, 1993." 26 U.S.C. § 9704(f)(1).

Petitioners' answers to Section 9704(f) do not withstand scrutiny. The Commissioner argues that, because Section 9704(f) "does not address [her] assignment responsibilities," it "affords no basis for inferring any limitations on [her] authority to make assignments." Br. 31. But, as just explained, the fact that Congress failed expressly to provide for an annual adjustment to reflect initial assignments on or after October 1, 1993—while it did provide for annual adjustments in other circumstances—is a good indication that Congress did not contemplate such assignments after the statutory deadline. The Commissioner nevertheless insists that, even if the lack of such a provision "might preclude an adjustment after October 1, 1993, * * * it would not follow that the Act barred the Commissioner from" making further assignments. *Id.* at 32. What a tangled web the Commissioner would weave just to prevail here. She would suppose Congress intended consequences to flow from assignments "as of October 1, 1993," and accordingly directed that she "shall" make assignments before that date. Yet she would also suppose Congress intended her to make assignments *after* that date, even if that meant that an operator's applicable percentage based on the assignments she got around to before October 1, 1993 could not be adjusted, and even though Congress provided for such an adjustment in other circumstances. Occam's razor suggests it is far more reasonable to conclude that Congress did not provide for adjustments to assignments "as of October 1, 1993" to reflect initial assignments after that date because Congress expected the Commissioner to make assignments "before October 1, 1993," as the law provided.

The Commissioner maintains that "[t]he fact that Congress required such adjustments to be made in at least two circumstances" does not suggest that adjustments cannot "be made in any other circumstances." Br. 33. As noted, however, the correct presumption is just the opposite. *See also Bozeman*, 533 U.S. at 156 (rejecting Federal Government's similar

suggestion that existence of one inapplicable exception supported implication of other exceptions to statute mandating that charges "shall" be dismissed if statute violated). Congress's deliberate enumeration of two circumstances in which adjustments must be made suggests that those were the *only* circumstances in which Congress intended adjustments to be made. If there were others, Congress presumably would have so provided. This is how the Solicitor General typically reads statutes, *see, e.g.*, *Christensen* v. *Harris County*, 529 U.S. 576, 583 n.4 (2000), and how this Court reads the Coal Act in particular. *See Sigmon Coal*, 122 S. Ct. at 951.[20]

Both the Commissioner and the Trustees argue that "the practicalities of administering the statute do not require that the number of assigned and unassigned beneficiaries be fixed in concrete as of October 1, 1993." Fed. Br. 35. *See also* Tr. Br. 37-39. According to the Commissioner, for instance, "[i]f beneficiaries are shifted between the assigned and unassigned beneficiary pools," it is easy enough for the Combined Fund to "recalculate the unassigned-beneficiary obligations for any particular plan year and make appropriate arrangements for refunds, credits, or requests for additional payments." *Id.* at 34-35.

But the feasibility of administering such a scheme is neither here nor there, because that is not the one Congress

[20] The Commissioner argues that there is no reason the Act should be read to prohibit adjustments in other circumstances, such as where assignments are invalidated on judicial review. Br. 33. Congress no doubt did not address that situation because it did not expect that some assignments under the Act would be declared unconstitutional or that the Commissioner would make assignments that violated the statute. By contrast, if Congress had expected SSA to continue to make initial assignments on or after October 1, 1993, it surely would have provided for adjustments on that basis. In any event, the fact that the Commissioner may be required to take steps after October 1, 1993 to remedy unlawful assignments does not mean that the statute itself contemplates such action pursuant to its own provisions.

enacted. With the exception of the appeals process to correct assignments made in error, Congress envisioned a one-time assignment process that would conclude by October 1, 1993. Congress anticipated that more beneficiaries would join the unassigned pool after October 1, 1993, *see, e.g.*, 26 U.S.C. § 9704(f)(2)(B), but it never intended for the Commissioner to attempt to assign beneficiaries deemed "unassigned" after that date.

4. Congress Gave The Agency Sufficient Time To Do The Job Congress Envisioned.

In a similar vein, the Commissioner argues that "a short, inflexible jurisdictional deadline" for making initial assignments is inconsistent with Congress's decision to impose liability on "related persons." Br. 26. The inclusion of "related persons" among responsible parties, the Commissioner claims, made it necessary in some cases "to trace winding connections and chains of transition in business ownership and control." *Id.* Thus, the Commissioner suggests, Congress could not have intended for her to stop making initial assignments as of October 1, 1993.

Congress, however, did not impose a "short, inflexible" deadline upon the agency. Rather, Congress gave the agency nearly a year to complete the assignment process. *See* note following 26 U.S.C. § 9701 (Coal Act enacted on October 24, 1992). Considering that, even under the Commissioner's current view of events, the agency nearly completed the task in less than three months, a year was more than enough time to make the required assignments.

Moreover, Congress provided the agency with a good head start. Congress directed the 1950 and 1974 UMWA Benefit Plans to provide to SSA, within 20 days of the statute's enactment, a list of the names and social security numbers of each eligible beneficiary (including each deceased beneficiary if any other individual was a beneficiary by reason of a relationship to such deceased beneficiary) and, to the extent

possible, the names of their former employers. *See* 26 U.S.C. § 9706(c). In addition, Congress directed the plans to identify, where possible, the parties who would be responsible for beneficiaries under the Act. *See id.* Congress also directed all other agencies to cooperate fully with SSA in providing information that would enable SSA to make assignments. *See id.* § 9706(d). Thus, when it enacted the Coal Act, Congress had every reason to believe that SSA would complete the assignment process by October 1, 1993.[21]

Petitioners' reasons for SSA's failure to assign more beneficiaries by the statutory deadline are not persuasive. Petitioners assert, for instance, that SSA could not begin the assignment process until Congress appropriated funds for that purpose in July 1993. *See* Fed. Br. 8-9; Tr. Br. 15-16.[22] But SSA had in fact laid extensive groundwork for making assignments prior to receiving those funds. As the then-Acting Commissioner informed a congressional subcommittee considering SSA's request for that appropriation, SSA had already worked on "procedures, notices, cost estimates, and systems requirements." *Departments of Labor, Health and Human Services, Education, and Related Agencies Appropriations for 1994: Hearings Before a Subcomm. of the*

[21] As noted, the 1950 and 1974 UMWA Benefit Plans possessed substantial information concerning the employment history of the Fund's beneficiaries. *See supra* n.8.

[22] According to the Commissioner, SSA determined that it was not legally authorized to use Social Security trust funds to carry out the assignment process under the Coal Act. *See* Br. 8. Congress, however, initially delegated the responsibility of making assignments to the Secretary of Health and Human Services. *See supra* n.13. It would certainly be odd for Congress to do so without appropriating funds if it did not intend for the Secretary to simply use existing departmental funds for that purpose. The Solicitor General's brief rather coyly notes the *Commissioner's* view that she was disabled from carrying out the duties assigned by Congress, without agreeing with that circumscribed view of the law.

House Comm. on Appropriations ("*1993 Appropriations Hearing*"), 103d Cong. 158 (1993) (Louis D. Enoff). Thus, by the time SSA began making actual assignments, it not only had much of the information it needed, but the system in place to handle that information.

Moreover, if making assignments to some "related persons" was as difficult and time-consuming as the Commissioner claims, it is all the more likely that Congress did not intend the Commissioner to continue making such assignments after the statutory deadline. As discussed, Congress did not intend for the Commissioner to go to the ends of the earth in an effort to track down a responsible party for every last beneficiary. Indeed, many beneficiaries assigned to "related persons" were "orphans" under the 1950 and 1974 UMWA Benefit Plans whose benefits were covered by coal operators that had never employed them. *See Sigmon Coal*, 122 S. Ct. at 947 n.4 (" 'true orphans' " were those "whose former employers were no longer in business"). It would make eminent sense for Congress to decide that if such beneficiaries could not be easily assigned by the statutory deadline, they would continue to be treated as "orphans" and dealt with under the Act's express provisions for unassigned beneficiaries.[23]

C. The *Brock* v. *Pierce County* Line Of Decisions Does Not Compel A Different Reading Of The Coal Act.

Petitioners' argument that Section 9706(a) is merely hortatory is based on a line of decisions in which this Court held that the failure of an agency or government official to act within a statutorily-prescribed period did not bar further

[23] To the extent the Commissioner suggests that she was unable to assign more beneficiaries by the statutory deadline because of the administrative review process, that is incorrect. *See* Br. 11. Operators and related persons were not even notified of assignments until September 1993. Thus, the appeals process did not even begin until *after* the deadline for making assignments had passed.

government action. *See Brock* v. *Pierce County*, 476 U.S. 253 (1986); *United States* v. *Montalvo-Murillo*, 495 U.S. 711 (1990); *United States* v. *James Daniel Good Real Property*, 510 U.S. 43 (1993).[24] Those decisions, however, are inapposite. As the Sixth Circuit recognized in *Dixie Fuel*, the Coal Act's statutory scheme "simply is not comparable to that addressed by the Court in *Brock* v. *Pierce County*." Pet. App. 47a.[25]

1. Unlike the statutes in *Pierce County* and its progeny, the Coal Act plainly spells out a consequence for the failure to act by its statutory deadline. *See Bozeman*, 533 U.S. at 153 (distinguishing *Montalvo-Murillo* on this ground). As we have explained, all beneficiaries not assigned by October 1, 1993 are dealt with according to the Act's express provisions for unassigned beneficiaries. *See supra* at 25-32. That is "[t]he consequence flowing from the failure of [SSA] to make [the required] assignments before October 1, 1993." Pet. App. 47a.

---

[24] The Trustees erroneously include *General Motors Corp.* v. *United States*, 496 U.S. 530 (1990), in this line of authority. *See* Br. 25, 37. Contrary to the Trustees' assertion, the agency in *General Motors* did not fail to "comply with all of the timing provisions" of a statute. *Id.* at 37. Indeed, the Court concluded that the agency action at issue was not subject to a four-month time limit in the statute. *See* 496 U.S. at 536-539. Having so concluded, the Court went on to hold that, because the statute did not reveal any congressional intent to create an enforcement bar if the agency unreasonably delayed action, the Court would not infer one. *See id.* at 539-542.

[25] Indeed, to the extent SSA in fact "completed the process of making the initial assignment decisions by October 1, 1993," *1995 Coal Act Hearing* at 23, as the agency represented to Congress, this case does not even involve the failure of an agency to act by a statutory deadline. It involves the quite different question whether an agency, having completed a congressional task by the statutory deadline and so advised Congress, is free to revisit and redo its work after the deadline has passed.

It does not matter that the statute does not explicitly state that beneficiaries not assigned by the deadline are to be considered "unassigned." That is in fact what they are. In any event, as this Court made clear in *Pierce County*, the consequence of an agency's noncompliance with a statutory deadline need not be "stated explicitly in the statute." 476 U.S. at 262 n.9. *See, e.g.*, 14 U.S. Op. Off. Legal Counsel 57, 60 (1990) (concluding that deadline likely mandatory even though statute did not specify consequence of delinquency on its face). To determine whether Congress intended to terminate an agency's authority to act, this Court looks to "normal indicia of congressional intent." *Pierce County*, 476 U.S. at 262 n.9. *See also James Daniel Good*, 510 U.S. at 65 (examining structure of timing provisions in statute); *Montalvo-Murillo*, 495 U.S. at 717, 719 (examining design and function of statute). Here, the "entire statutory scheme" of the Coal Act demonstrates Congress's intent to terminate the Commissioner's authority to make initial assignments as of October 1, 1993. Pet. App. 45a.

The Commissioner argues that the Coal Act does not specify a consequence because "no meaningful sanction could be imposed on the Commissioner, who does not 'enforce' the Coal Act against other parties." Br. 21. But this Court has never held that the statutory consequence of an agency's failure to abide by a deadline must be a "sanction" against the agency for that consequence to dictate that the deadline should be given effect according to its terms. *See, e.g.*, *Pierce County*, 476 U.S. at 262 n.9 ("We need not, and do not, hold that a statutory deadline for agency action can never bar later action unless *that* consequence is stated explicitly in the statute.") (emphasis added). Indeed, it would be absurd if the only way Congress could demonstrate its intent to terminate an agency's authority would be by imposing some sort of punishment upon the agency.

2. The Commissioner's argument, however, aptly points up the difference between the Coal Act and the statutes

involved in the *Pierce County* line of authority. In those cases, strict adherence to statutory deadlines would have stripped the agency or government official of the authority to "enforce" the law, thereby preventing the agency or official from protecting or vindicating "important public rights * * * at stake." *Pierce County*, 476 U.S. at 260. In *Pierce County*, for instance, the Secretary of Labor would have lost jurisdiction to proceed with an action to recover misspent federal funds. *See id.* at 258. In *Montalvo-Murillo*, the Government would have been required to release a criminal defendant found to pose a flight risk and a danger to the community. *See* 495 U.S. at 717. And in *James Daniel Good*, the Government would have been required to dismiss a forfeiture action. *See* 510 U.S. at 62-63. This Court declined to conclude that Congress in fact countenanced such "incongruous result[s]." *Pierce County*, 476 U.S. at 258.

Adhering to the Coal Act's deadline, by contrast, does not lead to "incongruous result[s]." The termination of the Commissioner's authority to make initial assignments means only that benefits for beneficiaries not assigned by the deadline are financed pursuant to the Act's express and detailed provisions for unassigned beneficiaries—which assure unassigned beneficiaries the *same* benefits as assigned beneficiaries, and which are also funded through assessments on operators. *See supra* at 25-32. Congress obviously contemplated that there would be unassigned beneficiaries, and explained how they should be handled. Enforcing the deadline hardly leads to a result unanticipated by Congress. The Commissioner is not stripped of any enforcement authority—indeed, as she concedes (Br. 21), she does not "enforce" the Coal Act at all. Nor are any "important public rights" jeopardized by the termination of the Commissioner's initial assignment authority. As even she recognizes, the initial assignment process "take[s] place under a statutory framework that is designed to establish relationships among *private* parties." *Id.* (emphasis in original).

3. Moreover, none of the decisions in the *Pierce County* line involved statutes directing an agency or government official to complete a one-time activity by a specific date critical to the implementation and operation of the statutory scheme.[26] Rather, each of the decisions involved statutes directing agencies or government officials to act within a prescribed period of time across a broad range of cases. In *Pierce County*, for instance, the Secretary of Labor was required to act on complaints within 120 days. *See* 476 U.S. at 254-255. In *Montalvo-Murillo* and *James Daniel Good*, government officials were directed to act "immediately" or "promptly." *See* 495 U.S. at 714; 510 U.S. at 63. Those statutes were all intended to move the Government along in hundreds of cases. *See, e.g., James Daniel Good*, 510 U.S. at 65 (statute's directive was "to ensure the expeditious collection of revenue"). Unlike here, strict adherence to those time limits was not essential to the operation of an entire statutory scheme. *See, e.g., Montalvo-Murillo*, 495 U.S. at 717 (failure to comply with timing provision did not "subvert the [statutory] scheme").

4. Finally, the *Pierce County* line of cases is premised on the Court's reluctance to "assume that Congress intended [an] agency to lose its power to act" when "there are less drastic remedies available for failure to meet a statutory deadline." 476 U.S. at 260. In *Pierce County*, for example, the Court concluded that a party aggrieved by the Secretary's failure to act on a complaint within 120 days could pursue the "less drastic remedy" of an action under the Administrative Procedure Act to " 'compel agency action unlawfully withheld or unreasonably delayed.' " *Id.* at 260 & n.7

---

[26] Although *Regions Hospital* v. *Shalala*, 522 U.S. 448 (1998), did not involve an agency's failure to act within statutorily-prescribed time limits, the Court noted in *dicta* that the failure of the Secretary of Health and Human Services to report to Congress by a statutorily specified date did not mean that the Secretary lacked authority to act beyond it. *See id.* at 459 n.3. That sort of deadline is of course far different from the one involved here.

(quoting 5 U.S.C. § 706(1)). Here, by contrast, no alternative remedy is available for SSA's failure to meet the Coal Act's deadline. Coal operators and related persons cannot bring suit to compel agency action "unreasonably delayed." Until SSA actually makes an untimely initial assignment, no one has any idea that the agency has "unreasonably delayed."

D. The Subsequent Enactment Of A Supplemental Appropriations Measure Does Not Demonstrate That Congress Intended The Commissioner To Make Initial Assignments In Perpetuity, Contrary To The Language Of Section 9706(a).

The Commissioner argues that Congress's appropriation of funds to SSA the year following the Coal Act's enactment somehow demonstrates that the Congress that enacted the Coal Act intended to allow the Commissioner to make initial assignments on or after of October 1, 1993. According to the Commissioner, SSA informed a congressional subcommittee considering SSA's request for funds that it was "unlikely" that the agency would assign all beneficiaries by the statutory deadline. Br. 37.[27] In subsequently appropriating funds to remain available "until expended," the Commissioner contends, Congress "expressed its understanding" that the Commissioner could make initial assignments beyond the statutory deadline. *Id.* at 39.

To the contrary, nothing about Congress's subsequent enactment of a supplemental appropriation for SSA even remotely suggests that the Congress that enacted the Coal Act intended the Commissioner to make initial assignments in perpetuity. As this Court has often opined, "the views of a

[27] Of course, SSA *later* reported to Congress that the agency "fully expect[s] [to] meet [its] statutory responsibility to * * * complete the assignment process by October 1, 1993," *1993 Coal Act Hearing* at 26, and later advised Congress that it had in fact "completed the process of making the initial assignment decisions by October 1, 1993, as required by law." *1995 Coal Act Hearing* at 23.

subsequent Congress form a hazardous basis for inferring the intent of an earlier one." *South Dakota* v. *Yankton Sioux Tribe*, 522 U.S. 329, 355 (1998) (quotation omitted). *See also Monsanto*, 491 U.S. at 610 ("postenactment views form a hazardous basis for inferring the intent behind a statute") (quotation omitted). Rather, Congress's intent is "best determined by [looking to] the statutory language that it chooses." *Id.* at 610 (quotation omitted) (alteration in original). As we have explained, the text of the Coal Act itself unambiguously expresses Congress's intent that the Commissioner make initial assignments "before October 1, 1993," not after. 26 U.S.C. § 9706(a).

Moreover, as the Commissioner herself acknowledges (Br. 39 n.22), the supplemental appropriation was intended for SSA not only to make initial assignments, but also to conduct the administrative review process and calculate the per beneficiary premium for each plan year. *See* 107 Stat. at 254 (appropriating funds "to carry out sections 9704 and 9706"). Because SSA would continue to carry out *those* responsibilities after October 1, 1993, Congress not surprisingly provided that the appropriation would remain available "until expended." *Id.*

Further, if anything can be gleaned from the legislative history of that supplemental appropriation at all, it is that even the Congress that enacted that measure understood the Commissioner's authority to make initial assignments to terminate as of October 1, 1993. The legislative history contains numerous references to the statutory deadline, but no suggestion by any member of Congress that SSA could continue to make initial assignments beyond that date. *See, e.g.*, *1993 Appropriations Hearing* at 125-126, 158-159.

In the end, the most telling thing Congress has done since it enacted the Coal Act is what it has not done—amend the Act to overturn the result in *Dixie Fuel*. In fact, in May 2000 Senator Rockefeller proposed legislation which, among other

things, would have amended the Act to provide the Commissioner with continuing authority to make initial assignments on or after October 1, 1993. *See* Coal Miners and Widows Health Protection Act of 2000, S. 2538, 106th Cong. § 3 (2000). That proposal went nowhere.

E. The Commissioner's Construction Of Her Authority To Make Initial Assignments On Or After October 1, 1993 Is Not Entitled To Deference.

The Commissioner spends a page (Br. 39-40) and the Trustees two (Br. 47-49) arguing that the Commissioner's current view that she is not bound by the October 1, 1993 statutory deadline is entitled to deference. The Commissioner begins with the startling assertion that her current position "is certainly not contradicted by anything in the statutory text." Br. 40. Nothing, of course, except the statutory text that states the Commissioner "shall" make assignments "before October 1, 1993." 26 U.S.C. § 9706(a).

Even if this Court concludes that Section 9706(a) is ambiguous, the Commissioner's "interpretation" of the statutory deadline deserves no deference. Congress did not delegate to the Commissioner the authority to promulgate interpretations of "shall, before October 1, 1993," that carry the force of law, and deference to an agency is singularly inappropriate in construing a provision specifically directed to constraining the manner in which the agency itself does its work. The Commissioner's latest interpretation is also not entitled to any weight under *Skidmore* v. *Swift & Co.*, 323 U.S. 134 (1944).

1. In *United States* v. *Mead Corporation*, 533 U.S. 218, 226-227 (2001), this Court clarified that *Chevron* deference is only available "when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority." Congress conferred no law-making authority on the Commissioner in the Coal Act. *Contrast* 30 U.S.C. § 932(h) ("The Secretary [of Labor] may also, by regulation, establish standards for apportioning liability for benefits * * * among more than one operator") (Black Lung Benefits Act). The most that the Commissioner can claim is that her particular assignments carry the force of law, Br. 40, which—for purported assignments after October 1, 1993—completely begs the question.

It is no surprise that Congress did not delegate law-making authority to the Commissioner in this area. The Commissioner's duties under the Act are discrete and precisely defined.[28] Aside from the mechanical calculation of the annual per beneficiary premium, the only role the Commissioner maintains in the administration of the statute after October 1, 1993 is to conduct the appeals process to correct assignments made in error.

Moreover, the Coal Act was the product of a carefully negotiated legislative compromise balancing numerous competing interests. "Its delicate crafting reflected a compromise amidst highly interested parties attempting to pull the provisions in different directions." *Sigmon Coal*, 122 S. Ct. at 956. Congress did not extend and, given the realities, could not have extended any authority to SSA that would have allowed it to upset the statute's carefully negotiated provisions. *See id.* ("We will not alter the text in order to

[28] As the then-Acting Commissioner acknowledged in September 1993 to a congressional oversight committee, "[t]he Coal Act is very precise as to the way we assign miners to coal operators, and *SSA has no discretion as to the way we apply the criteria.*" *1993 Coal Act Hearing* at 24 (Lawrence H. Thompson) (emphasis added). As another top SSA official reiterated five years later, "[SSA] has played a role almost as a contractor, in that SSA simply assigns the miners to the companies." *Agency Management of the Implementation of the Coal Act: Hearing Before the Senate Subcomm. on Oversight of Government Management, Restructuring and the District of Columbia of the Comm. on Governmental Affairs*, 105th Cong. 19 (1998) (Associate Commissioner Marilyn O'Connell).

satisfy the policy preferences of the Commissioner. These are battles that should be fought among the political branches and the industry."). *Contrast Barnhart* v. *Walton*, 122 S. Ct. 1265, 1267 (2002) (deferring to agency interpretation after concluding that agency was delegated "considerable authority to fill in matters of detail related to [the statute's] administration").

In any event, an agency may not evade statutory limitations simply by purporting to interpret a statute. *Adams Fruit Co.* v. *Barrett*, 494 U.S. 638, 650 (1990) ("Although agency determinations within the scope of delegated authority are entitled to deference, it is fundamental 'that an agency may not bootstrap itself into an area in which it has no jurisdiction.' ") (quoting *Federal Maritime Comm'n* v. *Seatrain Lines, Inc.*, 411 U.S. 726, 745 (1973)). In this case, the Commissioner is seeking not simply to exercise authority that Congress did not grant, but to evade a statutory provision that constrains her authority. No deference is owed to such efforts. An agency may not construe a statute "in a way that completely nullifies textually applicable provisions meant to limit its discretion." *Whitman* v. *American Trucking Ass'n*, 531 U.S. 457, 485 (2001). As the Court recently explained in rejecting a similar plea for deference under the Coal Act, Congress "did not delegate authority to the Commissioner * * * to assign liability in a manner inconsistent with the statute." *Sigmon Coal*, 122 S. Ct. at 956.

2. Examination of "the degree of the agency's care, its consistency, formality, and relative expertness" demonstrates that the Commissioner's interpretation of the Coal Act does not merit deference under *Skidmore*. *Mead*, 533 U.S. at 228 (footnotes omitted). The Commissioner's current interpretation of the Coal Act's timing provision is not the product of a rulemaking or any similar process. Nor does the straightforward question of statutory interpretation before this Court implicate SSA's relative expertise.

Moreover, SSA's current interpretation of the Coal Act's deadline flatly contradicts its earlier pronouncements. The agency originally described its duty under the Act as a "one-time assignment activity which *must* be completed *before October 1, 1993*." 58 Fed. Reg. 52,914 (Oct. 13, 1993) (emphases added); *see also* 58 Fed. Reg. 50,950 (Sept. 29, 1993). Testifying before Congress on September 9, 1993, the then-Acting Commissioner of SSA expressed the agency's view that it had a "*statutory responsibility* to * * * complete the assignment process by October 1, 1993." *1993 Coal Act Hearing* at 26 (Lawrence H. Thompson) (emphasis added). Later, he acknowledged that "*complet[ing]* the process of making the initial assignment decisions by October 1, 1993" was "required by law." *1995 Coal Act Hearing* at 23 (emphasis added).

The agency's shifting position on its authority under the Coal Act blunts any persuasive force its current litigating position might otherwise carry. *See EEOC* v. *Arabian American Oil Co.*, 499 U.S. 244, 257 (1991); *INS* v. *Cardoza-Fonseca*, 480 U.S. 421, 446 n.30 (1987) ("An agency interpretation * * * which conflicts with the agency's earlier interpretation is 'entitled to considerably less deference' than a consistently held agency view.") (quoting *Watt* v. *Alaska*, 451 U.S. 259, 273 (1981)). Even if this Court views Section 9706(a) as ambiguous, it should not accord any weight to the Commissioner's views.

CONCLUSION

For the foregoing reasons, the judgment below should be affirmed.

Respectfully submitted,

JOHN R. WOODRUM
W. GREGORY MOTT
HEENAN, ALTHEN & ROLES LLP
1110 Vermont Avenue, N.W.
Suite 400
Washington, D.C. 20005
(202) 887-0800

*Counsel of Record

JOHN G. ROBERTS, JR.*
LORANE F. HEBERT
HOGAN & HARTSON L.L.P.
555 Thirteenth Street, N.W.
Washington, D.C. 20004
(202) 637-5810

Counsel for Respondents

STATUTORY ADDENDUM

The Coal Industry Retiree Health Benefit Act of 1992, 26 U.S.C. §§ 9701 *et seq.*, provides in pertinent part:

§ 9702. Establishment of the United Mine Workers of America Combined Benefit Fund.

(a) Establishment. (1) In general. As soon as practicable (but not later than 60 days) after the enactment date, the persons described in subsection (b) shall designate the individuals to serve as trustees. Such trustees shall create a new private plan to be known as the United Mine Workers of America Combined Benefit Fund.

(2) Merger of retiree benefit plans. As of February 1, 1993, the settlors of the 1950 UMWA Benefit Plan and the 1974 UMWA Benefit Plan shall cause such plans to be merged into the Combined Fund, and such merger shall not be treated as an employer withdrawal for purposes of any 1988 coal wage agreement.

* * *

(b) Board of trustees. (1) In general. For purposes of subsection (a), the board of trustees for the Combined Fund shall be appointed as follows:

* * *

(B) one individual shall be designated by the three employers, other than 1988 agreement operators, who have been assigned the greatest number of eligible beneficiaries under section 9706;

* * *

(c) Plan year. The first plan year of the Combined Fund shall begin February 1, 1993, and end September 30, 1993. Each succeeding plan year shall begin on October 1 of each calendar year.

* * *

§ 9704. Liability of assigned operators.

(a) Annual premiums. Each assigned operator shall pay to the Combined Fund for each plan year beginning on or after February 1, 1993, an annual premium equal to the sum of the following three premiums—

(1) the health benefit premium determined under subsection (b) for such plan year, plus

(2) the death benefit premium determined under subsection (c) for such plan year, plus

(3) the unassigned beneficiaries premium determined under subsection (d) for such plan year.

Any related person with respect to an assigned operator shall be jointly and severally liable for any premium required to be paid by such operator.

(b) Health benefit premium. For purposes of this chapter—

(1) In general. The health benefit premium for any plan year for any assigned operator shall be an amount equal to the product of the per beneficiary premium for the plan year multiplied by the number of eligible beneficiaries assigned to such operator under section 9706.

(2) Per beneficiary premium. The Commissioner of Social Security shall calculate a per beneficiary premium for each plan year beginning on or after February 1, 1993 * * *

* * *

(d) Unassigned beneficiaries premium. The unassigned beneficiaries premium for any plan year for any assigned operator shall be equal to the applicable percentage of the product of the per beneficiary premium for the plan year multiplied by the number of eligible beneficiaries who are

not assigned under section 9706 to any person for such plan year.

* * *

(f) Applicable percentage. For purposes of this section—

(1) In general. The term "applicable percentage" means, with respect to any assigned operator, the percentage determined by dividing the number of beneficiaries assigned under section 9706 to such operator by the total number of eligible beneficiaries assigned under section 9706 to all such operators (determined on the basis of assignments as of October 1, 1993).

(2) Annual adjustments. In the case of any plan year beginning on or after October 1, 1994, the applicable percentage for any assigned operator shall be redetermined under paragraph (1) by making the following changes to the assignments as of October 1, 1993:

(A) Such assignments shall be modified to reflect any changes during the period beginning October 1, 1993, and ending on the last day of the preceding plan year pursuant to the appeals process under section 9706(f).

(B) The total number of assigned eligible beneficiaries shall be reduced by the eligible beneficiaries of assigned operators which (and all related persons with respect to which) had ceased business (within the meaning of section 9701(c)(6)) during the period described in subparagraph (A).

(g) Payment of premiums. (1) In general. The annual premium under subsection (a) for any plan year shall be payable in 12 equal monthly installments, due on the twenty-fifth day of each calendar month in the plan year. In the case of the plan year beginning February 1,

1993, the annual premium under subsection (a) shall be added to such premium for the plan year beginning October 1, 1993.

* * *

§ 9705. Transfers.

(a) Transfer of assets from 1950 UMWA Pension Plan.

(1) In general. From the funds reserved under paragraph (2), the board of trustees of the 1950 UMWA Pension Plan shall transfer to the Combined Fund—

(A) $70,000,000 on February 1, 1993,

(B) $70,000,000 on October 1, 1993, and

(C) $70,000,000 on October 1, 1994.

* * *

(3) Use of funds. Amounts transferred to the Combined Fund under paragraph (1) shall—

(A) in the case of the transfer on February 1, 1993, be used to proportionately reduce the premium of each assigned operator under section 9704(a) for the plan year of the Fund beginning February 1, 1993, and

(B) in the case of any other such transfer, be used to proportionately reduce the unassigned beneficiary premium under section 9704(a)(3) and the death benefit premium under section 9704(a)(2) of each assigned operator for the plan year in which transferred and for any subsequent plan year in which such funds remain available.

Such funds may not be used to pay any amounts required to be paid by the 1988 agreement operators under section 9704(i)(1)(B).

* * *

(b) Transfers from abandoned mine reclamation fund.

* * *

(2) Use of funds. Any amount transferred under paragraph (1) for any fiscal year shall be used to proportionately reduce the unassigned beneficiary premium under section 9704(a)(3) of each assigned operator for the plan year in which transferred.

* * *

§ 9706. Assignment of eligible beneficiaries.

(a) In general. For purposes of this chapter, the Commissioner of Social Security shall, before October 1, 1993, assign each coal industry retiree who is an eligible beneficiary to a signatory operator which (or any related person with respect to which) remains in business in the following order:

(1) First, to the signatory operator which—

(A) was a signatory to the 1978 coal wage agreement or any subsequent coal wage agreement, and

(B) was the most recent signatory operator to employ the coal industry retiree in the coal industry for at least 2 years.

(2) Second, if the retiree is not assigned under paragraph (1), to the signatory operator which—

(A) was a signatory to the 1978 coal wage agreement or any subsequent coal wage agreement, and

(B) was the most recent signatory operator to employ the coal industry retiree in the coal industry.

(3) Third, if the retiree is not assigned under paragraph (1) or (2), to the signatory operator which employed the

coal industry retiree in the coal industry for a longer period of time than any other signatory operator prior to the effective date of the 1978 coal wage agreement.

* * *

(c) Identification of eligible beneficiaries. The 1950 UMWA Benefit Plan and the 1974 UMWA Benefit Plan shall, by the later of October 1, 1992, or the twentieth day after the enactment date, provide to the Commissioner of Social Security a list of the names and social security account numbers of each eligible beneficiary, including each deceased eligible beneficiary if any other individual is an eligible beneficiary by reason of a relationship to such deceased eligible beneficiary. In addition, the plans shall provide, where ascertainable from plan records, the names of all persons described in subsection (a) with respect to any eligible beneficiary or deceased eligible beneficiary.

(d) Cooperation by other agencies and persons. (1) Cooperation. The head of any department, agency, or instrumentality of the United States shall cooperate fully and promptly with the Commissioner of Social Security in providing information which will enable the Commissioner to carry out his responsibilities under this section.

* * *

(3) Trustees. The trustees of the Combined Fund, the 1950 UMWA Benefit Plan, the 1974 UMWA Benefit Plan, the 1950 UMWA Pension Plan, and the 1974 UMWA Pension Plan shall fully and promptly cooperate with the Commissioner in furnishing, or assisting the Commissioner to obtain, any information the Commissioner needs to carry out the Commissioner's responsibilities under this section.

* * *

(f) Reconsideration by Commissioner. (1) In general. Any assigned operator receiving a notice under subsection (e)(2) with respect to an eligible beneficiary may, within 30 days of receipt of such notice, request from the Commissioner of Social Security detailed information as to the work history of the beneficiary and the basis of the assignment.

(2) Review. An assigned operator may, within 30 days of receipt of the information under paragraph (1), request review of the assignment. The Commissioner of Social Security shall conduct such review if the Commissioner finds the operator provided evidence with the request constituting a prima facie case of error.

(3) Results of review. (A) Error. If the Commissioner of Social Security determines under a review under paragraph (2) that an assignment was in error—

(i) the Commissioner shall notify the assigned operator and the trustees of the Combined Fund and the trustees shall reduce the premiums of the operator under section 9704 by (or if there are no such premiums, repay) all premiums paid under section 9704 with respect to the eligible beneficiary, and

(ii) the Commissioner shall review the beneficiary's record for reassignment under subsection (a).

* * *

FILED
JUL 22 2002
OFFICE OF THE CLERK

(10) (10)

Nos. 01-705 and 01-715

In the Supreme Court of the United States

JO ANNE B. BARNHART,
COMMISSIONER OF SOCIAL SECURITY, PETITIONER

v.

PEABODY COAL COMPANY, ET AL.

MICHAEL H. HOLLAND, ET AL., PETITIONERS

v.

BELLAIRE CORPORATION, ET AL.

ON WRITS OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

REPLY BRIEF FOR THE FEDERAL PETITIONER

THEODORE B. OLSON
Solicitor General
Counsel of Record
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

BEST AVAILABLE COPY

25 pp

TABLE OF CONTENTS

Page

1. Congress's use of "shall" and a particular date does not mean that Coal Act assignments made on or after October 1, 1993, are void 4
2. Respondents' argument that Congress intended the Commissioner to abandon all attempts to make assignments as of October 1, 1993, is at odds with the basic purposes of the Coal Act 10
3. The Coal Act does not provide that the consequence of SSA's failure to complete the assignment process before October 1, 1993, is that all remaining miners shall be deemed unassigned 16

TABLE OF AUTHORITIES

Cases:

Alabama v. *Bozeman*, 533 U.S. 146 (2001) 9
Anderson v. *Yungkau*, 329 U.S. 482 (1947) 9
Apogee Coal Co. v. *Holland*, No. 01-13691, 2002 WL 1491641 (11th Cir. July 12, 2002) 19
Barnhart v. *Sigmon Coal Co.*, 122 S. Ct. 941 (2002) 10
Brock v. *Pierce County*, 476 U.S. 253 (1986) 2, 6, 7, 8, 9, 10, 16, 17
Eastern Enterprises v. *Apfel*, 524 U.S. 498 (1998) .....
Escoe v. *Zerbst*, 295 U.S. 490 (1935) 8
Hallstrom v. *Tillamook County*, 493 U.S. 20 (1989) 9
Holland v. *Pardee Coal Co.*, 269 F.2d 424 (4th Cir. 2001), petition for cert. pending, No. 01-1366 (filed Mar. 14, 2002) 2-3, 14, 18
Mohasco Corp. v. *Silver*, 447 U.S. 807 (1980) 8
Regions Hosp. v. *Shalala*, 522 U.S. 448 (1998) 7, 19
Republic Nat'l Bank v. *United States*, 506 U.S. 80 (1993) 14

Cases—Continued: Page

St. Regis Mohawk Tribe v. *Brock*, 769 F.2d 37 (2d Cir. 1985), cert. denied, 476 U.S. 1140 (1986) 2
United States v. *Boyle*, 469 U.S. 241 (1985) 9
United States v. *Hoar*, 26 F. Cas. 329 (C.C.D. Mass. 1821) (No. 15,373) 7
United States v. *James Daniel Good Real Prop.*, 510 U.S. 43 (1993) 6, 7, 18
United States v. *Locke*, 417 U.S. 84 (1985) 9
United States v. *Montalvo-Murillo*, 495 U.S. 711 (1990) 3, 7
United States v. *Nashville, C. & St. L. Ry.*, 118 U.S. 120 (1886) 7
Wheeling-Pittsburgh Steel Corp. v. *Barnhart*, No. 5:99CV60 (N.D. W.Va. Mar. 29, 2002) 19

Constitution, statutes, and rule:

U.S. Const.:
Amend. XII 9
Amend. XX 9
Administrative Procedure Act, 5 U.S.C. 701 *et seq.* 17
Coal Industry Retiree Health Benefit Act of 1992, 26 U.S.C. 9701-9722 1
26 U.S.C. 9702(a)(2) 5
26 U.S.C. 9704(g)(1) 6
26 U.S.C. 9704(h) 5
26 U.S.C. 9705(a) 5
26 U.S.C. 9706(a) 6, 7, 17, 19
26 U.S.C. 9706(b) 13
26 U.S.C. 9706(f)(1) 20
26 U.S.C. 9706(f)(3)(A)(ii) 18
Consolidated Appropriations Act, 2000, Pub. L. No. 106-113, Tit. V, § 501, 113 Stat. 1501A-214 13
Department of the Interior and Related Agencies Appropriations Act, 2001, Pub. L. No. 106-291, Tit. VII, § 701(a), 114 Stat. 1024 13

Statutes and rule—Continued: Page

Energy Policy Act of 1992, Pub. L. No. 102-486, Tit. XIX, § 19142, 106 Stat. 3037 2
30 U.S.C. 1231(a) 14
30 U.S.C. 1231(b) 14
30 U.S.C. 1231(c)(1) 14
30 U.S.C. 1231(e) 15
30 U.S.C. 1232(a) 13, 14
30 U.S.C. 1232(h) 13
Fed. R. Civ. P. 25(a) 9

Miscellaneous:

Agency Management of the Implementation of the Coal Act: Hearing Before the Subcomm. on Oversight of Government, Management, Restructuring, and the District of Columbia of the Senate Comm. on Governmental Affairs, 105th Cong., 2d Sess. (1998) 4
Coal Commission Report on Health Benefits of Retired Coal Miners: Hearing Before the Subcomm. on Medicare and Long-Term Care of the Senate Comm. on Finance, 102d Cong., 1st Sess. (1991) 12, 15
138 Cong. Rec. (1992):
p. 34,001 ..... 11, 15
p. 34,002 11
p. 34,006 14
p. 34,007 15
p. 34,032 ..... 11, 15
Departments of Labor, Health and Human Services, Education, and Related Agencies Appropriations For 1994: Hearings Before a Subcomm. of the House Comm. on Appropriations, 103d Cong., 1st Sess., Pt. 2 (1993) 3-4
General Accounting Office:
Analysis of the Administration's Proposal to Ensure Solvency of the United Mine Workers of America Combined Benefit Fund (Aug. 15, 2000) 13
Retired Coal Miners' Health Benefit Funds: Financial Challenges Continue (Apr. 2002) 13

Miscellaneous—Continued: Page

H.R. Conf. Rep. No. 461, 102d Cong., 2d Sess. (1992) 15
H.R. Conf. Rep. No. 914, 106th Cong., 2d Sess. (2000) 13
Provisions Relating to the Health Benefits of Retired Coal Miners: Hearing Before the House Comm. on Ways and Means, 103d Cong., 1st Sess. (1993) 4
Staff of House Comm. on Ways and Means, 104th Cong., 1st Sess., *Development and Implementation of the Coal Industry Retiree Health Benefit Act of 1992* (Comm. Print 1995) 4

In the Supreme Court of the United States

No. 01-705

JO ANNE B. BARNHART,
COMMISSIONER OF SOCIAL SECURITY, PETITIONER

v.

PEABODY COAL COMPANY, ET AL.

No. 01-715

MICHAEL H. HOLLAND, ET AL., PETITIONERS

v.

BELLAIRE CORPORATION, ET AL.

ON WRITS OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

REPLY BRIEF FOR THE FEDERAL PETITIONER

Respondents contend that Congress intended to divest the Commissioner of Social Security of jurisdiction to make any assignments of retired miners to coal operators under the Coal Industry Retiree Health Benefit Act of 1992 (Coal Act or Act), 26 U.S.C. 9701-9722, on or after October 1, 1993, and that all such assignments must now be held to be void.

That is so, in respondents' view, even though the result would be that thousands of retired miners who would otherwise be properly assigned to respondents and other operators under the criteria specified in the Coal Act would instead be incorrectly and permanently treated as unassigned; even though respondents and other operators similarly (and fortuitously) situated would thereby avoid responsibility for the health-care benefits of retired miners whom they had actually employed, as well as those miners' spouses and dependents; and even though those health-care costs would become the responsibility of the government or of other coal operators that had never employed the miners concerned or had any affiliation with any operator that had ever employed them. As this Court observed in *Brock* v. *Pierce County*, 476 U.S. 253 (1986), where it rejected a similar contention, the proposition that Congress intended such consequences "is not, to say the least, of the sort that commands instant assent." *Id.* at 258 (quoting *St. Regis Mohawk Tribe* v. *Brock*, 769 F.2d 37, 41 (2d Cir. 1985) (Friendly, J.), cert. denied, 476 U.S. 1140 (1986)).

In fact, respondents' description of the Coal Act would be unrecognizable to the Congress that enacted that statute. Congress's stated purposes, set forth in the text of the Coal Act itself, were to "identify persons *most responsible* for plan liabilities" and to "provide for the continuation of a *privately financed self-sufficient program* for the delivery of health care benefits" to retired miners. See Energy Policy Act of 1992, Pub. L. No. 102-486, Tit. XIX, § 19142, 106 Stat. 3037 (emphasis added). As the Fourth Circuit has explained, Congress reacted to the impending collapse of the predecessor health-care trusts—caused largely by coal operators foisting responsibility for their own retirees onto unrelated operators—by grounding the Coal Act in a "pay for your own" principle. See *Holland* v. *Pardee Coal Co.*, 269 F.3d 424, 428 (2001), petition for cert. pending, No. 01-

1366 (filed Mar. 14, 2002). Given Congress's painstaking efforts to avoid a recurrence of the downward spiral of the predecessor trusts, Congress could hardly have intended to require that, if the Social Security Administration (SSA) was unable to complete the massive assignment process by October 1, 1993, the Commissioner should simply abandon the task and throw all remaining miners irretrievably into the unassigned pool. Congress did not intend to "bestow" such a "windfall," *United States* v. *Montalvo-Murillo*, 495 U.S. 711, 720 (1990), on the operators whose former employees happened to be among those who remained to be assigned as of October 1, 1993.

The circumstances surrounding the implementation of the Coal Act make it all the more unlikely that Congress intended to require SSA to abandon the entire assignment process on October 1, 1993. The Coal Act required the Commissioner to assign 65,000 retired miners to the proper operators according to the detailed criteria set forth in the Act—a task that required manually sorting thousands of earnings records to determine each miner's employment history and reviewing hundreds of corporate transactions to determine whether entities were "related persons" of companies that had employed miners. See Gov't Br. 8-10. SSA informed Congress when it sought a supplemental appropriation to fund SSA's costs of making those assignments that the process might not be completed by October 1, 1993. Congress did not enact that supplemental appropriation until July 2, 1993, only three months before October 1, 1993. See *id.* at 8-9.[1]

---

[1] Respondents ignore the fact that when an SSA official informed Congress that an additional appropriation was necessary for the agency to carry out the assignment process, he specifically told Congress that the process *could not be completed* before October 1, 1993. See Gov't Br. 36-37; *Departments of Labor, Health and Human Services, Education, and Related Agencies Appropriations For 1994: Hearings Before a Subcomm.*

1. Congress's Use Of "Shall" And A Particular Date Does Not Mean That Coal Act Assignments Made On Or After October 1, 1993, Are Void

Respondents lay great stress on the fact that Congress used a mandatory word—"shall"—in directing the Commissioner to complete the assignment process by October 1, 1993. See Peabody Br. 21-23; Bellaire Br. 17-19. But the issue in this case is not whether Congress intended, when it enacted the Coal Act, to require the Commissioner to complete the assignment process for each beneficiary before October 1, 1993. Rather, the pertinent question is what

---

of the House Comm. on Appropriations, 103d Cong., 1st Sess. Pt. 2, at 158-159 (1993). Later in the year, after the necessary appropriation had been enacted into law, SSA expressed greater optimism that the agency could complete the process in time, but it did not give Congress a guarantee of timely completion; rather, the Acting Commissioner stated: "You understand, we are trying to assign 65,000 miners in two months, and I think we will make it." *Provisions Relating to the Health Benefits of Retired Coal Miners: Hearing Before the House Comm. on Ways and Means*, 103d Cong., 1st Sess. 40 (1993). As respondents point out (Peabody Br. 40 n.25; Bellaire Br. 43), two years later, the same SSA official told the House Ways and Means Committee that SSA had successfully completed the initial assignment process by October 1, 1993. See also *Agency Management of the Implementation of the Coal Act: Hearing Before the Subcomm. on Oversight of Government Management, Restructuring, and the District of Columbia of the Senate Comm. on Governmental Affairs*, 105th Cong., 2d Sess. 19 (1998) (similar testimony of Marilyn O'Connell, Associate Commissioner of SSA). While those statements were incorrect, SSA did *not* tell Congress that it lacked the *power* to make any assignments on or after October 1, 1993. In addition, on the same date in 1995 that the SSA official told the Ways and Means Committee that the assignment process had been completed before October 1, 1993, the staff of that committee published a report making clear that SSA had not yet completed the entire initial assignment process. See Staff of House Comm. on Ways and Means, 104th Cong., 1st Sess., *Development and Implementation of the Coal Industry Retiree Health Benefit Act of 1992*, at 30 (Comm. Print 1995).

Congress intended the Commissioner to do if, contrary to Congress's expectation when the Coal Act became law, the Commissioner was unable to make a proper assignment of a miner before that date. Would Congress have intended the Commissioner to make an assignment in compliance with the statutory criteria, albeit after the date by which such assignments were to be made, or (as respondents argue) would Congress have intended the Commissioner to throw up her hands and treat all such miners as unassigned, knowing that such treatment was incorrect under the statute? That question cannot be answered simply by pointing to the fact that Congress used the word "shall" and a particular date in the Coal Act.

Indeed, there are several other places in the Act where Congress, using the word "shall," required that an event occur by a certain date, and yet no one would contend that Congress prohibited the event from taking place after that date. For example, in 26 U.S.C. 9702(a)(2), Congress directed that the predecessor health-care trusts "shall" be merged into the new UMWA Combined Benefit Fund (Combined Fund) "[a]s of February 1, 1993." Yet it is unimaginable that, if for some reason, the predecessor trusts were unable to effectuate the merger by that date, Congress would have intended that the new Combined Fund should never have come into existence. Similarly, in 26 U.S.C. 9705(a), Congress required that the 1950 UMWA Pension Plan "shall" transfer $210 million to the Combined Fund in three separate tranches "on" three specific dates. But it is inconceivable that, if for some reason, a transfer could not have been made "on" (or before) the specified date, Congress would have intended that the transfer should never occur. And while Congress provided in 26 U.S.C. 9704(h) that the trustees of the Combined Fund "shall, not later than 60 days after the enactment date," furnish SSA information about benefits, covered beneficiaries, and other matters necessary

to enable SSA to compute premiums due from operators, Congress surely did not intend to divest the trustees of their authority (or excuse their duty) to furnish such information to SSA after that date.

The foregoing provisions were designed to spur the trustees of the predecessor trusts and the Combined Fund into taking the steps necessary to ensure that the Combined Fund would be up and running by the dates specified in the Act, and into conveying information to SSA to assist the agency in doing its part to ensure that the funds necessary to support the payment of health-care benefits would be expeditiously secured from the operators that the Act makes responsible. In furtherance of that same overarching goal, Congress provided in 26 U.S.C. 9706(a) that SSA in turn "shall" assign each miner to a particular operator before October 1, 1993, to ensure that the Combined Fund would actually receive premiums from the responsible operators expeditiously at the beginning of the first fiscal year in which the Combined Fund was to be supported by such premiums. See 26 U.S.C. 9704(g)(1); Gov't Br. 8 & n.5.

"It would make little sense to interpret directives designed to ensure the expeditious collection of revenues [from operators] in a way that renders the [Combined Fund] unable, in certain circumstances, to obtain [those] revenues at all." *United States* v. *James Daniel Good Real Prop.*, 510 U.S. 43, 65 (1993). By the same token, "[c]onspicuously absent" from the text or legislative history of the Coal Act "is any reference to the possibility that the [October 1, 1993] provision might convey rights upon the [operators]." *Pierce County*, 476 U.S. at 264. For these reasons, the October 1, 1993, date "was clearly intended to spur the [Commissioner] to action, not to limit the scope of [her] authority." *Id.* at 265.

This Court has recognized in a series of cases that statutory dates established to spur governmental action should

not be read to produce counterintuitive results, and accordingly has held that Congress's direction that a government official "shall" perform a function within a particular period is not sufficient to divest the official of jurisdiction to act after that date. *Pierce County*, 476 U.S. at 259-260; *Montalvo-Murillo*, 495 U.S. at 717-718; *James Daniel Good*, 510 U.S. at 63-64; see *Regions Hosp.* v. *Shalala*, 522 U.S. 448, 459 (1998). As this Court explained in *Pierce County*, that rule is but a particular application of the general and "frequently articulated * * * great principle of public policy * * * which forbids that the public interests should be prejudiced by the negligence"—or, *a fortiori*, by the practical inability—"of the officers or agents to whose care they are confided." 476 U.S. at 260 (quoting *United States* v. *Nashville, C. & St. L. Ry.*, 118 U.S. 120, 125 (1886)) (internal quotation marks omitted).[2]

This Court had already decided *Pierce County* and *Montalvo-Murillo* at the time Congress passed the Coal Act. Congress is therefore presumed to have intended that the requirement in Section 9706(a) that SSA "shall, before October 1, 1993," assign each miner to the responsible operator would not divest SSA of jurisdiction to act after that date—just as specific dates in other provisions of the Act for completion of other tasks by private trustees did not divest the trustees of their authority to act after those dates. See pp. 5-6, *supra*. Certainly, no one in Congress or SSA

---

[2] As shown by the Court's citation to the decision in *Nashville, Chattanooga & St. Louis Railway*, that "great principle" also finds expression in the rule that the government is presumptively not bound by general statutes of limitations or the doctrine of laches. As Justice Story explained the basis for that rule, "the king is always busied for the public good," and therefore may not be in a position "to assert his right within the times limited to subjects." *United States* v. *Hoar*, 26 F. Cas. 329, 330 (C.C.D. Mass. 1821) (No. 15,373).

acted as if the October 1, 1993, date had the remarkable consequences that respondents attribute to it.

The cases cited by respondents (Peabody Br. 21-22; Bellaire Br. 20) for the proposition that Congress intends mandatory language to be obeyed are not to the contrary. The question in this case is not whether Congress intends mandatory language to be obeyed, but the analytically distinct question whether Congress intended to divest an agency official of all authority to act (or to excuse her from a duty to act) if she was unable to complete action by a specified date. The great majority of the cases cited by respondents did not involve the inability of government agencies to meet time limits, and thus did not present the question whether an agency loses power to act if it fails to do so. For the same reason, those cases also did not implicate the special concern, noted above, that the inability of the government's agents to act within a specified time should not deprive government of the power to act in the public interest. See *Pierce County*, 476 U.S. at 261 (distinguishing *Mohasco Corp.* v. *Silver*, 447 U.S. 807 (1980), cited by Bellaire (Br. 20), on that ground).[3]

---

[3] Even the decisions cited by respondents that hold that government agents must act according to mandatory language setting time limits do not establish that, in the absence of express language so providing, government agencies lose the *power* to act according to Congress's instructions if those time limits are not met. Thus, in *Escoe* v. *Zerbst*, 295 U.S. 490 (1935), the Court ordered the release of an offender on probation who had been arrested on a revocation warrant where the government had not followed the statutory requirement that such a probationer "shall forthwith be taken before the court," but the Court stressed that the discharge was without prejudice to the government's authority to rearrest and commit the probationer in conformity with the statute (*id.* at 494). The Court also did not express any doubt that, if the government failed in the future to bring an arrested probationer before the court "forthwith," it could avoid the probationer's release by bringing him before the court, albeit in tardy fashion.

Moreover, in many of respondents' cited cases, the statute either specified that the consequence of a failure to meet a statutory deadline was a loss of power to proceed further,[4] or involved a statute of limitations, in which the consequence of failure to make a timely filing, dismissal of the action, is inherent in the nature of the deadline. See *Pierce County*, 476 U.S. at 261 (distinguishing *Mohasco*). The Coal Act, however, does not state anywhere that the Commissioner is divested of jurisdiction to act after September 30, 1993, or that any assignment made on or after October 1, 1993, shall be void. Nor does this case involve a time limit for a relatively simple matter, such as the time for filing a complaint

---

[4] See *Alabama* v. *Bozeman*, 533 U.S. 146, 153 (2001) (Interstate Agreement on Detainers specified that if a prisoner was returned to the sending state before trial, the indictment in the receiving state "shall not be of any further force" and must be dismissed) (emphasis omitted); *Hallstrom* v. *Tillamook County*, 493 U.S. 20, 24 (1989) (statute specified that, if litigant failed to follow pre-filing notification requirements, a lawsuit shall be "prohibited"); *United States* v. *Locke*, 471 U.S. 84, 89 (1985) (statute provided that failure to assert mining claim in timely fashion "shall be deemed conclusively to constitute an abandonment of the mining claim * * * by the owner"); *United States* v. *Boyle*, 469 U.S. 241, 243 (1985) (statute provided that, in the event of a failure to file a timely tax return, penalties shall be added); *Anderson* v. *Yungkau*, 329 U.S. 482, 484 (1947) (under Federal Rule of Civil Procedure 25(a) as then in effect, if substitution of proper parties was not made within two years after death of a party, "the action shall be dismissed").

Bellaire's reliance (Br. 18-19) on constitutional provisions requiring actions to be taken by certain dates is even further afield in ascertaining the meaning of an Act of Congress passed in 1992. In any event, those provisions make clear who has authority and who does not after the specified date. See, *e.g.*, U.S. Const. Amend. XII (providing that, if a President is to be chosen by the House of Representatives and the House does not choose a President by the appointed date, "then the Vice-President shall act as President"); Amend. XX ("The terms of the President and Vice President shall end at noon on the 20th day of January.").

that was at issue in cases such as *Mohasco*. Rather, this case involves a much "more substantial task" (*Pierce County*, 476 U.S. at 261)—the Commissioner's duty to sort through records concerning 65,000 retirees and to find the proper assigned operator for each of those individuals. "There is less reason, therefore, to believe that Congress intended such drastic consequences to follow from the [Commissioner's] failure" to complete that task by October 1, 1993. *Ibid.*[5]

2. Respondents' Argument That Congress Intended The Commissioner To Abandon All Attempts To Make Assignments As Of October 1, 1993, Is At Odds With The Basic Purposes Of The Coal Act

Nothing in the Coal Act suggests that Congress intended for the Commissioner to be divested on October 1, 1993, of all jurisdiction to make assignments, and that any assignments

[5] Contrary to Bellaire's contention (Br. 39-40), this case is not like *Barnhart* v. *Sigmon Coal Co.*, 122 S. Ct. 941 (2002), in which the Court concluded that the congressional policy animating the Coal Act, strongly favoring assignments of miners to particular operators rather than the unassigned pool, could not overcome the plain language of the Act, which precluded assigning miners to direct successors in interest of signatory operators that had gone out of business. In this case, no language in the Coal Act divests the Commissioner of authority to make assignments on or after October 1, 1993 (including to a signatory operator that was a retired miner's actual employer), or provides that any such assignments shall be void.

Nor is there merit to Bellaire's argument (Br. 31) that this case is distinguishable from *Pierce County* and similar cases because the October 1, 1993, date was attached to the assignment authority delegated to the Commissioner by Congress in the Coal Act. In *Pierce County*, the 120-day period for agency action on complaints of mismanagement in job-training programs was attached to Congress's statutory delegation to the Secretary of Labor to act on such complaints, and yet the Court ruled that the Secretary had power to take action even after that 120-day period had run. See 476 U.S. at 259-266.

made after that date are void. To the contrary, an examination of the Coal Act as a whole clearly indicates that Congress did not intend to preclude the Commissioner from correctly assigning miners pursuant to the Coal Act's criteria, rather than irretrievably—and incorrectly—relegating them to the unassigned pool, as of October 1, 1993. The whole thrust of the Act was to assign retired miners, whenever possible, to coal operators that had employed them (or to "related persons" of such operators). Congress was particularly concerned with avoiding a replay of the last days of the old benefit trusts, in which the coal operators remaining within the collective bargaining system were forced to shoulder the health-care costs of miners who had worked for other, unrelated companies. Congress was also determined to establish the Combined Fund as a self-sufficient private entity and to avoid, to the extent possible, federal subsidization of retired miners' benefits.[6]

Attempting to downplay Congress's concern that each retired miner should be assigned to a particular operator, respondents argue (Peabody Br. 25-28; Bellaire Br. 13, 36-38) that Congress would have been satisfied with a "rough justice" approach under which most miners, more or less, would have been assigned to the proper operator, and the cost of other miners' benefits would have been shouldered collectively by all operators. But such justice would seem

[6] See 138 Cong. Rec. 34,001 (1992) (Sen. Wallop) ("[I]t is more appropriate to assign the cost of providing these benefits to ongoing business entities which have or had a relationship with the signatory employer, than to tax totally unrelated entities to fund the contractually promised benefits."); *id.* at 34,002 ("overriding purpose" of Act's assignment provisions is "to find and designate a specific obligor for as many beneficiaries in the Plans as possible"); *id.* at 34,032 (Sen. Rockefeller) ("[T]he basic funding mechanism of this legislation generally requires premium payments from those for whom the retirees worked. These are the responsible companies.").

very rough indeed to an operator required to pay for part of the health-care costs of a miner who had never worked for it (or any of its affiliates) even while that miner's actual employer remained in business. Indeed, a principal reason why the predecessor trusts stood on the brink of collapse when Congress enacted the Coal Act was that operators that had left the sector of the coal industry covered by the national collective-bargaining system had shifted the costs of their own retirees to the operators that remained in that system, and the remaining operators did not intend to accept that cost-shifting any longer.[7] The Coal Commission established by the Secretary of Labor to propose solutions to the looming crisis in retired miners' benefits likewise expressed the view that it was unfair to require coal operators to pay for the benefits of retirees who had worked for other operators that remained in business.[8] Thus, it is simply not the case, as respondents suggest, that Congress was interested only in ensuring that miners would have the cost of their benefits covered, and showed little concern about the party that was to be made responsible for those costs. To the contrary, Congress well understood that those two goals are interrelated, and that the future success of the Combined Fund depended crucially on the "pay for your own" principle,

[7] See *Coal Commission Report on Health Benefits of Retired Coal Miners: Hearing Before the Subcomm. on Medicare and Long-Term Care of the Senate Comm. on Finance*, 102d Cong., 1st Sess. 45, 48, 53 (1991) (testimony of Michael K. Reilly, Bituminous Coal Operators' Association) (*Coal Commission Report Hearing*).

[8] See *Coal Commission Report Hearing* 139 (testimony of Henry H. Perritt, Jr., Vice Chair of Coal Commission); see also *id.* at 214-215 (Coal Commission report, explaining that more than half of beneficiaries of predecessor trusts had been employed by coal operators that remained in business but had successfully "dumped" their retirees onto the trusts, and stating that "this situation is intolerable and must be stopped").

which diminished operators' incentives to go out of business rather than pay for other companies' retirees.

Respondents attempt to minimize the possibility that other operators might be forced to pay for their own retirees' health care benefits by pointing out that, until now, congressionally mandated transfers of interest earned on the Department of the Interior's Abandoned Mine Land Reclamation Fund (AML Fund) have covered deficits in the Combined Fund's operations. Congress did provide in the Coal Act for annual transfers, commencing in Fiscal Year 1996, of interest earned on the AML Fund to the Combined Fund. See 26 U.S.C. 9706(b); 30 U.S.C. 1232(h). Those anticipated transfers, however, have not been sufficient to prevent deficits in the Combined Fund.[9] Congress has twice provided short-term relief to the Combined Fund by authorizing additional transfers of interest from the AML Fund.[10] On the latter occasion, however, the Conference Committee made clear that, because the public fisc should not be responsible for the long-term solvency of the Combined Fund, it was "the final time the [Department of the] Interior will provide [additional] funds to the Combined Benefit Fund." See H.R. Conf. Rep. No. 914, 106th Cong., 2d Sess. 200 (2000).

Because the AML Fund is itself financed by a statutory fee on certain coal mining operations (see 30 U.S.C. 1232(a)), respondents suggest that transfers of interest from the

[9] See General Accounting Office, *Retired Coal Miners' Health Benefit Funds: Financial Challenges Continue* 1-2, 8 (Apr. 2002); General Accounting Office, *Analysis of the Administration's Proposal to Ensure Solvency of the United Mine Workers of America Combined Benefit Fund* 2-3 (Aug. 15, 2000).

[10] See Department of the Interior and Related Agencies Appropriations Act, 2001, Pub. L. No. 106-291, Tit. VII, § 701(a), 114 Stat. 1024; Consolidated Appropriations Act, 2000, Pub. L. No. 106-113, Tit. V, § 501, 113 Stat. 1501A-214.

AML Fund to the Combined Fund amount merely to a reshuffling of funds among coal operators, and are not charges on the public account. See Peabody Br. 12, 30; Bellaire Br. 38. That is not an accurate description of the operation of the AML Fund or of the interest earned on that Fund. In the first place, the universe of companies that are subject to the AML fee—those *currently* engaged in coal mining (see 30 U.S.C. 1232(a))—is not the same as the universe of operators (and their related persons) that must pay for the health-care benefits of their *past* employees under the Coal Act. And the fact that the AML Fund is financed through government-imposed fees on coal mining does not mean that the proceeds of those fees are anything other than public monies once they are received by the government. See 30 U.S.C. 1231(a) and (b) (proceeds of AML fee are deposited in the Treasury); *Republic Nat'l Bank* v. *United States*, 506 U.S. 80, 93 (1993) (opinion of Rehnquist, C.J.) ("funds deposited in the Treasury" are "public money").

Moreover, contrary to respondents' intimations, AML Fund interest that is transferred to the Combined Fund is not a kind of cost-free "found money." As the Fourth Circuit pointed out in *Pardee* (269 F.3d at 438), the fundamental purpose of the AML Fund is to ameliorate the serious safety and health consequences of surface mining (see 30 U.S.C. 1231(c)(1)), and to the extent that interest on the AML Fund is diverted to other purposes (no matter how worthy), that interest is not available for the important public purpose of surface mining reclamation. Moreover, as the Congressional Research Service explained in a detailed analysis of the AML Fund prepared to assist Congress in its consideration of the proposal to provide for transfers from that Fund to the Combined Fund, the AML Fund is an entry on the books of the government's general fund, not a cash balance sitting in a bank account. See 30 U.S.C. 1231(a); 138 Cong. Rec. 34,006 (1992). Thus, in a period of federal budget deficits

such as the present, surplus collections from the AML Fund are borrowed by the general fund to cover general federal operations. See 30 U.S.C. 1231(e). To the extent that surplus is diminished or unavailable to the general fund, the government must *pro tanto* borrow from the public by issuing treasury debt and must pay interest on that debt. See 138 Cong. Rec. at 34,007. In a very real sense, then, money transferred from the AML Fund to the Combined Fund represents a cost to the general public.

More fundamentally, respondents simply disregard Congress's painstaking efforts to ensure that the responsibility for financing the health-care costs of retired coal miners would *not* end up in the lap of the government (or a group of different operators), but would fall to the most appropriate entity—the company that employed the miner. Once the President vetoed an earlier bill that would have financed retirees' benefits in part through taxes on coal production and imports, there was no consensus in Congress for any proposal that would have financed unassigned miners' benefits through additional fees or taxes.[11] Members of the Coal Commission with widely differing perspectives on the crisis in the predecessor trusts also agreed that Congress should not make "the public sector responsible for providing health care for a significant new group of retirees who historically have had a comprehensive private structure for financing and delivering health care."[12] But at bottom, respondents

---

[11] See *Eastern Enterprises* v. *Apfel*, 524 U.S. 498, 513-514 (1998) (opinion of O'Connor, J.); H.R. Conf. Rep. No. 461, 102d Cong., 2d Sess. 274-275 (1992) (prior bill); see 138 Cong. Rec. 34,001 (1992) (Sen. Wallop) (Congress did not intend to create a "new federal entitlement program"); *id.* at 34,032 (Sen. Rockefeller).

[12] *Coal Commission Report Hearing* 138 (Coal Commission Vice Chair Perritt); see *id.* at 237 (four members of Coal Commission, expressing opposition to "state-sponsored health care for those who are tied to one industry").

are attempting to shift the health-care costs of *their own* retired employees to the public (or to other operators). That is a result Congress did not countenance. It therefore would be antithetical to the structure, background, and purposes of the Coal Act to require that result simply because SSA was unable to make all of the necessary assignments before October 1, 1993. Cf. *Pierce County*, 476 U.S. at 262 ("the protection of the public fisc is a matter that is of interest to every citizen, and we have no evidence that Congress wanted to permit the Secretary's inaction to harm that interest").

3. The Coal Act Does Not Provide That The Consequence Of SSA's Failure To Complete The Assignment Process Before October 1, 1993, Is That All Remaining Miners Shall Be Deemed Unassigned

Although nothing in the Coal Act expressly renders void assignments made by the Commissioner on or after October 1, 1993, respondents argue that the invalidity of such assignments follows from the fact that any miner who cannot be assigned to a particular operator is treated as unassigned, and is therefore not the sole responsibility of any particular operator. See Peabody Br. 23-25; Bellaire Br. 20-21. Contrary to respondents' contention, however, the fact that a miner who had not yet been assigned to a particular operator (or related person) by October 1, 1993, was left in a pool of unassigned miners was simply the incidental effect of the ordinary operation of a process in which the assignment of each miner depended upon an affirmative determination by SSA of the particular operator (or related person) that was responsible for that miner under the Act. A miner's presence in the unassigned pool therefore did not reflect an affirmative determination by SSA that he must permanently remain unassigned, even if SSA later was able to identify the operator (or related person) that the Act renders responsible

for payment of his health care benefits. Thus, the fact that the Coal Act puts in place a back-up provision for the payment of benefits even to miners whom SSA is never able to assign to a particular operator does not mean that the Act divested SSA of all power to make assignments of those miners whom it *can* assign to particular operators on or after October 1, 1993, and that all such assignments therefore are void.

Respondents maintain that Congress was intent on permanently fixing all assignments of retirees to individual coal operators as of October 1, 1993, so that operators would know their obligations with certainty. See Peabody Br. 29-30; Bellaire Br. 25-27. But nothing in the text, purposes, or background of the Coal Act remotely suggests that that date was a statute of repose intended as a special benefit *for* coal operators. To the contrary, Section 9706(a) was intended to provide for the expeditious collection of premiums *from* coal operators. See pp. 5-6, *supra*.[13]

---

[13] For that reason, Bellaire errs in arguing (Br. 28-31) that, when a statute requires an agency to perform a function by a particular date, the agency should be allowed to undertake that task after that date only when some other remedy would be available to compel the agency to complete its obligations in a timely fashion, such as an action under the Administrative Procedure Act (APA), 5 U.S.C. 701 *et seq.*, to compel agency action unlawfully withheld. In *Pierce County*, the Court observed that, if the Secretary of Labor failed to observe the 120-day time limit for decisions on complaints about irregularities in federally funded job-training programs, the complainant might be able to bring suit under the APA to compel the Secretary to take action, and the grant recipient might also be able to do so if the 120-day limit was intended to protect its interests as well. See 476 U.S. at 260 & n.7. Although a coal operator might not have been able to bring an APA action to compel SSA to complete the Coal Act assignment process before (or even shortly after) October 1, 1993, that only underscores the point that the Coal Act did not confer on a coal operator a statutory right to agency action before that date. In other words, the Coal Act did not create any special statutory

There is ample evidence, by contrast, that Congress was greatly concerned about ensuring that retirees were properly assigned to the operators for which they worked (or a related person), see pp. 11-12, *supra*, and that Congress thought that concern more weighty than "the coal operators' interest, if any, in finalizing assignments by October 1, 1993." *Pardee*, 269 F.3d at 434. Congress provided, for example, that, if the administrative review process revealed that the Commissioner had made an erroneous assignment of a miner to a particular operator, the Commissioner should review that miner's record for possible reassignment to another operator, rather than deem that miner unassigned— which would have been more consistent with respondents' statute of repose theory. See 26 U.S.C. 9706(f)(3)(A)(ii).

In addition, as Peabody acknowledges (Br. 36 n.20), if an assignment of a miner to a particular operator is invalidated on *judicial* review, SSA may reassign that miner to another operator rather than deem him unassigned—even though the Coal Act provides no express authority for SSA to make such a reassignment, and even though such judicial decisions might be rendered many years after the initial assignments

---

interest in repose for the benefit of coal operators that would be judicially enforceable.

Moreover, this Court has never ruled that the existence of an alternative remedy such as an APA action is a *prerequisite* for a determination that an agency has jurisdiction to act even when it has failed to meet an obligation to act within a time specified in a statute. Indeed, in *James Daniel Good*, the Court ruled that the United States had authority to bring a forfeiture action even when the government failed to meet timing requirements other than the statute of limitations, even though there was no evident mechanism for the judiciary to compel government compliance with those timing requirements. See 510 U.S. at 64 (noting that Congress had left to agency discretion how to discipline officials for noncompliance).

were made.[14] So too here, SSA may assign a miner to a particular operator according to the Coal Act's criteria if it was unable to do so before October 1, 1993. The overarching point is that Congress intended SSA to ensure, if possible, that a miner was *correctly* assigned according to the detailed criteria set forth at 26 U.S.C. 9706(a), and not *incorrectly*—and permanently—treated as unassigned. Cf. *Regions Hosp.*, 522 U.S. at 460 (declining to construe Medicare Act to require "[e]rror perpetuation" from base year throughout all subsequent years); *id.* at 458-459 ("it is hard to believe that Congress intended that misclassified and nonallowable costs [would] continue to be recognized * * * indefinitely") (internal quotation marks omitted).

Peabody suggests (Br. 36 n.20) that Congress did not expressly provide SSA with authority to reassign miners to particular operators in response to judicial decisions invalidating SSA's initial assignments because Congress did not expect that the Commissioner would make erroneous assignments. That point does not distinguish this case. Clearly, Congress did not *expect*, when it enacted the Coal Act, that the Commissioner would fail to make assignments before October 1, 1993. Neither, however, did Congress bar the Commissioner from making a proper assignment after that date given the unfortunate circumstance that SSA was unable to make some correct assignments before that date —just as Congress did not bar SSA from making new assignments of miners to particular operators in the unfortunate

---

[14] Indeed, SSA is currently making such reassignments in response to this Court's decisions invalidating assignments in *Eastern Enterprises* and *Sigmon Coal*. See *Apogee Coal Co.* v. *Holland*, No. 01-13691, 2002 WL 1491641, at *5 (11th Cir. July 12, 2002) (observing that SSA may make reassignments in response to judicial decisions invalidating assignments); *Wheeling-Pittsburgh Steel Corp.* v. *Barnhart*, No. 5:99CV60 (N.D. W.Va. Mar. 29, 2002), slip op. 32-33 (upholding SSA's authority to make such reassignments).

event that SSA's initial assignments of those miners were overturned on judicial review. In both cases, accuracy, rather than definitive agency action before October 1, 1993, was Congress's primary concern. The issue is not whether Congress expected that SSA might make assignments that did not conform to the statute, but rather whether Congress intended to require SSA to treat miners who had not been assigned in conformity with the statute as permanently *unassigned*. As we have explained, Congress did not.[15]

* * * * *

For the foregoing reasons, as well as those set forth in our opening brief, the judgments of the court of appeals should be reversed.

Respectfully submitted.

THEODORE B. OLSON
Solicitor General

JULY 2002

---

[15] There is no merit to Bellaire's alarmist assertion that our submission will allow SSA to conduct an "[i]nterminable assignment process" (Bellaire Br. 25). First, some initial assignments were made to operators within a few months after October 1, 1993, simply because SSA could not complete the assignment process before that date. Second, additional assignments were made to operators at later dates based on information that SSA obtained in the process of reviewing administrative appeals of other assignments. See Gov't Br. 11. That process has also come to an end, because operators were required to initiate the process of administrative review within 30 days of receiving their assignments. 26 U.S.C. 9706(f)(1).

No. 01-705, 01-715

Supreme Court, U.S.
JUL 22 2002
OFFICE OF THE CLERK

In the Supreme Court of the United States

JO ANNE B. BARNHART, Commissioner of Social Security,
Petitioner,

v.

PEABODY COAL COMPANY, *et al.*

MICHAEL H. HOLLAND, *et al.*, as Trustees of the United Mine Workers of America Combined Benefit Fund,
Petitioners,

v.

BELLAIRE CORPORATION, *et al.*

On Writs of Certiorari to the United States Court of Appeals For the Sixth Circuit

---

REPLY BRIEF FOR PETITIONERS THE TRUSTEES OF THE UMWA COMBINED BENEFIT FUND

JOHN R. MOONEY
ELIZABETH A. SAINDON
MOONEY, GREEN, BAKER, and SAINDON, P.C.
1920 L Street, N.W., Suite 400
Washington, D.C. 20036
(202) 783-0010

PETER BUSCEMI
Counsel of Record
ANNE BRAFFORD
MORGAN, LEWIS & BOCKIUS LLP
1111 Pennsylvania Avenue, N.W.
Washington, D.C. 20004
(202) 739-5190

DAVID W. ALLEN
JONATHAN SOKOLOW
Office of the General Counsel
UMWA HEALTH & RETIREMENT FUNDS
2121 K Street, N.W.
Washington, D.C. 20037
(202) 521-2220

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

27 pp

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iii

I. THE WORD "SHALL" IS NOT DISPOSITIVE 2

II. THE COAL ACT DOES NOT "SPECIFY A CONSEQUENCE" FOR THE COMMISSIONER'S FAILURE TO COMPLETE THE ASSIGNMENT PROCESS BEFORE OCTOBER 1, 1993 4

III. COMPLETION OF THE ASSIGNMENT PROCESS BEFORE OCTOBER 1, 1993 WAS NOT ESSENTIAL TO THE PROPER FUNCTIONING OF THE COAL ACT 6

IV. RESPONDENTS' EFFORT TO DERIVE SUPPORT FROM OTHER PROVISIONS OF THE COAL ACT IS WITHOUT MERIT 8

A. The Commissioner's Reassignment Authority Under Section 9706(f)(3) Does Not Preclude Initial Assignments After September 30, 1993. 9

B. The Coal Act's Provision For Adjustment of The Applicable Percentage Under Section 9704(f)(2) Does Not Imply That SSA Is Prohibited From Making Initial Assignments After September 30, 1993 10

C. The Designation Of Beneficiaries As Unassigned After Their Assigned Operator Has Gone Out Of Business Does Not Indicate That SSA Was Barred From Making Initial Assignments After September 30, 1993. 12

D. The Failure Of The Rockefeller Amendment Does Not Indicate That The Congress That Enacted The Coal Act Intended The October 1, 1993 Date To Be Jurisdictional..... 13

V. RESPONDENTS' PROFFERED POLICY JUSTIFICATIONS FOR THEIR INTERPRETATION OF THE COAL ACT ARE BOTH UNSUPPORTED AND INSUPPORTABLE..... 14

VI. AT MINIMUM, THE COMMISSIONER'S INTERPRETATION OF SECTION 9706(a) IS ENTITLED TO DEFERENCE..... 18

CONCLUSION. 20

TABLE OF AUTHORITIES

Page

CASES

Anderson v. Yungkau,
329 U.S. 482 (1947) 2

Apogee Coal Co. v. Holland,
No. 01-13691, 2002 WL 1491641 (11th Cir. July 12, 2002) 11

Brock v. Pierce County,
476 U.S. 253 (1986) 3, 4, 6, 16

Burns v. United States,
501 U.S. 129 (1991) 11

Cheney R.R. Co. v. ICC,
902 F.2d 66 (D.C. Cir. 1990) 12

Clinchfield Coal Co. v. Federal Mine Safety and Health Review Comm'n, 895 F.2d 773
(D.C. Cir. 1990)..... 11, 12

Consumer Product Safety Comm'n v. GTE,
447 U.S. 102 (1980) 13

Eastern Enterprises v. Apfel,
524 U.S. 498 (1998) 6, 11

Environmental Def. Ctr. v. Babbitt,
73 F.3d 867 (9th Cir. 1995)..... 17

Exxon Chem. Patents, Inc. v. Lubrizol Corp.,
935 F.2d 1263 (Fed. Cir. 1991)..... 15

Forest Guardians v. Babbitt,
174 F.3d 1178 (10th Cir. 1999)..... 17

Fort Worth Nat'l Corp. v. FSLIC,
469 F.2d 47 (5th Cir. 1972)..... 16

French v. Edwards,
80 U.S. (13 Wall.) 506 (1871)..... 5

General Motors Corp. v. United States,
496 U.S. 530 (1990) 8

Holland v. Pardee Coal Co.
269 F.3d 424 (4th Cir. 2001), *cert. pending*, No. 01-1366 (docketed Mar. 18, 2002) 7, 20
In re Barr Labs., Inc.,
930 F.2d 72 (D.C. Cir. 1991) 16, 17
Lexecon v. Milberg Weiss Bershad Hynes & Lerach,
523 U.S. 26 (1998) 2
Lopez v. Davis,
531 U.S. 230 (2001) 2
Miller v. French,
530 U.S. 327 (2000) 2
Pension Benefit Guar. Corp. v. LTV Corp.,
496 U.S. 633 (1990) 13
Regions Hosp. v. Shalala,
522 U.S. 448 (1998) 3, 14
Skidmore v. Swift & Co.,
323 U.S. 134 (1944) 18
St. Regis Mohawk Tribe v. Brock,
769 F.2d 37 (2d Cir. 1985) 4
United States v. Heirs of Boisdore,
49 U.S. (8 How.), 113 (1849) 14
United States v. James Daniel Good Real Prop.,
510 U.S. 43 (1993) 3, 4, 6
United States v. Mead Corp.,
533 U.S. 218 (2001) 18
United States v. Monsanto,
491 U.S. 600 (1989) 2
United States v. Montalvo-Murillo,
495 U.S. 711 (1990) 3
United States v. Nashville, C. & St. L. Ry.,
118 U.S. 120 (1886) 5
United States Nat. Bank of Ore. v. Independent Ins. Agents of America, Inc.,
508 U.S. 439 (1993) 14
Weinberger v. Hynson, Westcott & Dunning, Inc.,
412 U.S. 609 (1973) 14

Werner v. Werner,
267 F.3d 288 (3d Cir. 2001) 17

STATUTES

26 U.S.C. § 9704 ..... *passim*
26 U.S.C. § 9706 ..... *passim*

OTHER AUTHORITIES

AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE
(New College ed. 1976) 6

NORMAN J. SINGER, SUTHERLAND ON STATUTES AND STATUTORY CONSTRUCTION
(6th ed. 2001) 16

REPLY BRIEF FOR PETITIONERS THE TRUSTEES OF THE UMWA COMBINED BENEFIT FUND

Most noteworthy in respondents' briefs are the arguments that are missing:

- Respondents acknowledge (for present purposes, at least) that all of the beneficiaries at issue *should* have been assigned to them under the statutory criteria set forth in Section 9706(a) of the Coal Act, 26 U.S.C. § 9706(a). The challenged assignments, in other words, are exactly what Congress intended them to be.

- Respondents do not argue that their financial burden is any greater because the assignments at issue were made after October 1, 1993, rather than before. The health care premiums that respondents are being asked to pay are thus exactly the premiums that Congress intended them to pay.

- Respondents do not suggest that Congress was indifferent on the question whether Combined Fund beneficiaries were assigned or were left unassigned. To the contrary, it is uncontested that Congress wanted as many beneficiaries as possible to be assigned to specific former employers (or related persons to such employers) and to leave as few beneficiaries as possible unassigned.

- Respondents, though they wave the "plain meaning" banner, point to no statement in the Coal Act declaring that the Commissioner is prohibited from making initial assignments after October 1, 1993, or that any such assignments are invalid, or that any beneficiaries not assigned before October 1, 1993 must be considered forever unassigned. In fact, Congress included no such provision in the statute, although it would have been easy to do so if Congress had intended to produce the result that respondents advocate.

The absence of all the foregoing arguments is not accidental. Rather, it is symptomatic of the fundamental flaws in respondents' position. The central feature of the Coal Act is a congressional decision to replace a contractual system based on the collective responsibility of all participating employers with a statutory system based on the individual responsibility of specific former employers to which particular retirees are assigned. Respondents' position seeks to undermine this basic legislative choice and to subordinate it to the allegedly overriding imperative of administrative adherence to a single statutory date. None of the arguments that respondents advance supports this topsy-turvy outcome.

I. THE WORD "SHALL" IS NOT DISPOSITIVE.

Bellaire's first line of argument focuses on the word "shall" in Section 9706(a). "Shall means shall," Bellaire lectures, and the word is mandatory, not discretionary. Citing a number of unrelated cases involving the word "shall," Bellaire attempts to persuade the Court that the very character of the word is enough to divest the Commissioner of the authority to act after September 30, 1993.

But none of the cases on which Bellaire relies concerned the power of a government agency to perform its statutorily assigned tasks after a date by which Congress wanted the work to be complete.[1/] The issue is not whether

---

1/ *See, e.g., Anderson v. Yungkau,* 329 U.S. 482, 485-86 (a civil case "shall" be dismissed against decedent under Fed. R. Civ. P. 25(a) if substitution not made within two years); *United States v. Monsanto,* 491 U.S. 600 (1989) (criminal defendant who is convicted "shall" forfeit property related to the crime); *Lopez v. Davis,* 531 U.S. 230, 241 (2001) (Bureau of Prisons "shall" provide residential substance abuse treatment to prisoners); *Lexecon v. Milberg Weiss Bershad Hynes & Lerach,* 523 U.S. 26 (1998) (Judicial Panel on Multidistrict Litigation "shall" remand pending case to originating court at or before conclusion of pretrial proceedings); *Miller v. French,* 530 U.S. 327 (2000) (motion to terminate

"shall" is mandatory, but what Congress intended to happen if SSA were unable to complete the initial assignment process before October 1, 1993. Acknowle lging "shall" as the "language of command" does not determine the result if and when the command is not followed. Congress may command that an agency "shall" issue regulations by a given date, yet no one would contend that failure to complete the task on time should preclude the agency from performing its statutory obligation. Similarly here, Congress directed that the Commissioner "shall" assign Combined Fund beneficiaries before October 1, 1993, but the agency's inability to complete the task by the specified date did not mean that the task should be abandoned.

If there were any doubt that the word "shall" cannot bear the weight that respondents would give it, that doubt is removed by this Court's decisions in *Brock v. Pierce County*, 476 U.S. 253 (1986), *United States v. Montalvo-Murillo*, 495 U.S. 711 (1990), *United States v. James Daniel Good Real Prop.*, 510 U.S. 43 (1993), and *Regions Hosp. v. Shalala,* 522 U.S. 448 (1998). All of these cases involved statutes that, using the word "shall," directed the government or one of its agencies to perform certain acts within a specified time period or by a specified date. In *Pierce County*, for example, the Comprehensive Employment and Training Act provided that the Secretary of Labor, on receiving a complaint alleging misuse of CETA funds, "shall" determine the truth of the allegations "not later than 120 days after" receipt of the complaint. In *Regions Hospital*, a Medicare statute provided that the Secretary of Health and Human Services "shall" report to specified congressional committees no later than December 31, 1987 regarding the methodology for reimbursing hospitals for graduate medical education. This

---

prospective relief under Prison Litigation Reform Act "shall" operate as automatic stay of prior decree from 30 days of filing of motion).

Court ruled that the government's failure to comply with the statutory time periods did not deprive the agencies of the authority to act. Whatever other arguments respondents may make about these decisions, they establish at minimum that the word "shall" in Section 9706(a), even if "mandatory," is not by itself sufficient to terminate the Commissioner's authority to assign Combined Fund beneficiaries after September 30, 1993.

II. THE COAL ACT DOES NOT "SPECIFY A CONSEQUENCE" FOR THE COMMISSIONER'S FAILURE TO COMPLETE THE ASSIGNMENT PROCESS BEFORE OCTOBER 1, 1993.

Respondents' efforts to distinguish the *Pierce County* line of cases are unsuccessful. They contend that the statutes at issue in those cases involved law enforcement, applied to a "broad range of cases" rather than a "one-time activity," and did not deal with a "comprehensive and date-laden scheme." Bellaire Br. 28-33; Peabody Br. 39-44. None of these asserted distinctions explains why the October 1, 1993 date in the Coal Act should be accorded a legal status different from the dates or time periods involved in the cases cited by the Trustees and the Commissioner. As this Court explained in *James Daniel Good*, "if a statute does not specify a consequence for noncompliance with statutory timing provisions, the federal courts will not in the ordinary course impose their own coercive sanction." 510 U.S. at 63. The Coal Act does not specify that any Combined Fund beneficiaries not assigned before October 1, 1993 must remain forever unassigned, and, in the absence of such a statutory specification, the courts should not imply one.

Judge Friendly's discussion in *St. Regis Mohawk Tribe v. Brock*, 769 F.2d 37, 41-46 (2d Cir. 1985), is instructive. Prefiguring this Court's decision the following year in *Pierce County*, and disagreeing with earlier contrary rulings by the Third and Ninth Circuits, the Second Circuit

cited numerous cases, including several from this Court, that recognized the "great principle of public policy" that public interests should not be prejudiced by "the negligence of the officers or agents to whose care they are confided." *Id.* at 42 (quoting *United States v. Nashville, C. & St. L. Ry.*, 118 U.S. 120, 125 (1886)). The court emphasized that "[t]he legislature will not be deemed to have departed from this policy unless it clearly says so." *Id.*[2/]

Contrary to respondents' submissions, therefore, it is not enough that Congress created two categories of Combined Fund beneficiaries, assigned and unassigned. If the Commissioner's failure to complete the assignment process before October 1, 1993 was thereafter to deprive the Commissioner of all authority to assign beneficiaries who could and should have been assigned under the statute's substantive criteria, it was incumbent on Congress to say so. Congress made no such statement, nor would it have had any reason to adopt such an approach. Under respondents' scheme, *fewer* beneficiaries would have their health care financed by specific former employers, and *more* beneficiaries would have their health care financed out of public funds earmarked by statute for another purpose

---

2/ *See also French v. Edwards*, 80 U.S. (13 Wall.) 506, 511 (1871):

> There are undoubtedly many statutory requisitions intended for the guide of officers in the conduct of business devolved upon them, which do not limit their power or render its exercise in disregard of the requisitions ineffectual. Such generally are regulations designed to secure order, system, and dispatch in proceedings, and by a disregard of which the rights of parties interested cannot be injuriously affected. Provisions of this character are not usually regarded as mandatory unless accompanied by negative words importing that the acts required shall not be done in any other manner or time than that designated.

entirely. *James Daniel Good*, *Pierce County*, and similar decisions teach that such a consequence detrimental to public interests should not be implied from agency delay but must be "specified" by Congress. To "specify" is to "state explicitly,"[3/] and the Coal Act contains no such explicit statement.

III. COMPLETION OF THE ASSIGNMENT PROCESS BEFORE OCTOBER 1, 1993 WAS NOT ESSENTIAL TO THE PROPER FUNCTIONING OF THE COAL ACT.

Respondents attempt to argue (Bellaire Br. 24-25; Peabody Br. 23-25) that completion of all initial beneficiary assignments before October 1, 1993 was indispensable to proper operation of the statutory scheme. That is plainly not so, as actual experience under the Coal Act has shown.

All Combined Fund beneficiary assignments—whether initial assignments made before October 1, 1993, initial assignments made on or after October 1, 1993, revised assignments following a successful administrative appeal under Section 9706(f)(2), or revised assignments necessitated by this Court's decision in *Eastern Enterprises v. Apfel*, 524 U.S. 498 (1998)—are effective February 1, 1993, the beginning of the Combined Fund's first plan year. Health care premiums are assessed against assigned operators for the plan year beginning February 1, 1993 and for each plan year thereafter. If and when there is a change in the operator to which a beneficiary is assigned, or a previously assigned beneficiary becomes unassigned (as a result of an administrative appeal, for example), or a previously unassigned beneficiary becomes assigned, adjustments to

3/ American Heritage Dictionary of the English Language 1240 (New College ed. 1976).

premium assessments are made going back to February 1, 1993.

Each assigned operator's annual premium statement, mailed in October of each year, not only assesses premiums for the plan year then just beginning but also revises the premium assessments for all prior years and reflects appropriate credits or additional billings based on all changes since the previous statement. As the Fourth Circuit recognized in *Holland v. Pardee Coal Co.*, 269 F.3d 424, 434 (4th Cir. 2001), *cert. pending*, No. 01-1366 (docketed Mar. 18, 2002), "the Combined Fund uses an accounting method called 'inception billing,' which annually adjusts for the retroactive effects of adjusted beneficiary assignments." This procedure enables the Combined Fund Trustees to give full effect to all of the Commissioner's beneficiary assignments, including initial assignments made on or after October 1, 1993.[4/]

Apparently recognizing that the Combined Fund's actual experience belies any suggestion that completion of all initial assignments before October 1, 1993 was indispensable to the Coal Act's operation, Bellaire resorts to a series of labels that allegedly describe the date's role in the statutory

4/ Bellaire's own example—that of Mrs. Saylor—confirms the point. *See* Bellaire Br. 26-27. Before her death in September 1994, Mrs. Saylor received health coverage from the Combined Fund during the Fund's first two plan years. At that time, Mrs. Saylor was an unassigned beneficiary, and her health care was financed from the first two of the three statutorily mandated $70 million annual transfers from the UMWA 1950 Pension Plan to the Combined Fund. *See* 26 U.S.C. § 9705(a). Thereafter, when Mrs. Saylor was assigned to Bellaire, Bellaire was assessed health care premiums for the two plan years during which Mrs. Saylor received benefits from the Combined Fund, and the Combined Fund adjusted its accounting so that the Pension Plan transferred amounts previously used for Mrs. Saylor's health premiums would be available to defray the premiums of other unassigned beneficiaries.

scheme. The Coal Act is said to be "a chrono-centric statute," and October 1, 1993 allegedly "sits at the crossroads" and "holds the pivotal position" among all other dates and schedules. Bellaire Br. 13, 24. These empty phrases smack of numerology. The frequency or prominence of a date's mention in a statute does not in some mysterious way limit an agency's authority to act. The question remains one of congressional intent, and this Court has held that any such restriction on an agency's power to perform its statutory tasks must be clearly expressed. *See, e.g., General Motors Corp. v. United States*, 496 U.S. 530, 542 (1990) ("In the absence of a specific provision suggesting that Congress intended to create an enforcement bar, we decline to infer one."). The Coal Act nowhere prohibits the Commissioner from completing the initial assignment process after September 30, 1993.

IV. RESPONDENTS' EFFORT TO DERIVE SUPPORT FROM OTHER PROVISIONS OF THE COAL ACT IS WITHOUT MERIT.

Respondents claim that several provisions of the Coal Act outside of Section 9706(a) support their argument that the Commissioner lacked authority to make initial beneficiary assignments after September 30, 1993. They rely, for example, on the Commissioner's statutory authority to make revised beneficiary assignments after successful administrative appeals; on the provisions for adjustments to the "applicable percentage" reflecting each assigned operator's share of the total number of assigned beneficiaries; and on the lack of any provision for assigning Combined Fund beneficiaries to a second assigned operator if the original assigned operator (and each of its related persons) goes out of business. None of these features of the Coal Act supports respondents' position.

A. The Commissioner's Reassignment Authority Under Section 9706(f)(3) Does Not Preclude Initial Assignments After September 30, 1993.

Peabody argues that, because Section 9706(f) authorizes SSA to reassign beneficiaries after successful administrative appeals, and because such reassignments necessarily would occur after October 1, 1993, there is a negative implication that Congress intended to preclude SSA from making initial assignments on or after October 1, 1993. Peabody Br. 32. The argument is a non sequitur. If Section 9706(f)(3) has any bearing at all, it shows that Congress had an overriding interest in getting the beneficiary assignments right, and was prepared to permit SSA to continue the process well beyond October 1, 1993 to serve that end.

The relevant provision says that, if an assignment has been found to be in error, "the Commissioner shall review the beneficiary's record for reassignment under subsection (a)." 26 U.S.C. § 9706(f)(3)(A)(ii). Peabody's argument posits that Congress wanted to correct erroneous assignments however long the process took, but that, at the same time, Congress wanted to leave some beneficiaries permanently unassigned however clear it became that that classification was erroneous under the statutory criteria. Peabody offers no sensible explanation for this dichotomy, and none can be found in the statute.

There is still a further point about Section 9706(f)(3). It refers to "reassignment under subsection (a)," in a context where it is clear that any reassignment would be made after October 1, 1993. Elsewhere, however, respondents contend that any reference to assignments under Section 9706 or 9706(a) necessarily means assignments made before October 1, 1993. *See, e.g.*, Bellaire Br. 20. Section 9706(f)(3) shows that statutory references to assignments "under Section 9706"

do not imply the temporal limitation that respondents advocate.

B. The Coal Act's Provision For Adjustment Of The Applicable Percentage Under Section 9704(f)(2) Does Not Imply That SSA Is Prohibited From Making Initial Assignments After September 30, 1993.

Section 9704(f)(1) of the Coal Act defines the statutory phrase "applicable percentage." The phrase refers to a fraction in which the numerator is a given operator's number of assigned beneficiaries, and the denominator is the total number of assigned beneficiaries (determined on the basis of assignments as of October 1, 1993). The "applicable percentage" is used in computing each operator's pro rata share of any death benefit premium assessed under Section 9704(c) and any unassigned beneficiaries premium assessed under Section 9704(d).

Section 9704(f)(2) provides for annual adjustments to the applicable percentage to take account of changes in beneficiary assignments as a result of the administrative appeals process or as a result of assigned operators (and their related persons) going out of business. Respondents contend that these two grounds for annual adjustments are necessarily exhaustive, that therefore there can be no adjustments for initial beneficiary assignments made after October 1, 1993, and that therefore any such initial assignments must be precluded by the statute. Bellaire Br. 21-22; Peabody Br. 32-35. The argument is misguided.

All Combined Fund beneficiary assignments, whether initially made before or after October 1, 1993, are made as of that date (indeed, as of February 1, 1993, for purposes of first-year premiums). Thus, whenever and for whatever reason beneficiary assignments are made or altered after October 1, 1993, the resulting assignments are made "as of October 1, 1993," and the changes are incorporated into the

calculation of the applicable percentage. The specific adjustments mentioned in Section 9704(f)(2) simply confirm that the applicable percentage is not static but is subject to annual adjustment based on intervening events.

When, for example, the Commissioner declared several thousand beneficiary assignments void as a result of this Court's decision in *Eastern Enterprises* and subsequently reassigned some of those beneficiaries to other operators, the changes were reflected in the computation of the applicable percentage. This in turn affected the proper allocation of the three $70 million transfers from the 1950 Pension Plan during the Combined Fund's first three plan years and resulted in a supplemental assessment against the remaining assigned operators. These adjustments were made even though Section 9704(f) makes no reference to the possible need for adjustments based on a constitutional ruling of this Court. The Eleventh Circuit has sustained the Trustees' supplemental assessments after *Eastern*. *See Apogee Coal Co. v. Holland*, No. 01-13691, 2002 WL 1491641 (11th Cir. July 12, 2002) ("The Coal Act explicitly contemplates that certain changes in assignments will be made from time to time over the history of the Combined Fund, and requires that premiums be recalculated retroactively to plan year 1993 to reflect such changes.").

Respondents' argument, which relies on the "expressio unius est exclusio alterius" maxim of statutory interpretation, is not an appropriate inference from congressional silence where, as here, the inference is contrary to textual and contextual evidence of congressional intent. *See Burns v. United States*, 501 U.S. 129, 136-37 (1991); *see also Clinchfield Coal Co. v. Federal Mine Safety and Health Review Comm'n*, 895 F.2d 773, 779 (D.C. Cir. 1990) ("The difficulty of the [expressio unius] doctrine—and the reason it is not consistently applied—is that it disregards several other plausible explanations for an omission. The drafter (here

Congress) may simply not have been focussing on the point") (internal citations omitted). The expressio unius maxim is "an especially feeble helper in an administrative setting," as here, "where Congress is presumed to have left to reasonable agency discretion questions that it has not directly resolved." *Cheney R.R. Co. v. ICC*, 902 F.2d 66, 69 (D.C. Cir. 1990) (citing *Clinchfield Coal*, 895 F.2d at 779).

C. The Designation Of Beneficiaries As Unassigned After Their Assigned Operator Has Gone Out Of Business Does Not Indicate That SSA Was Barred From Making Initial Assignments After September 30, 1993.

Peabody argues that, because the Coal Act does not provide for *reassignment* of Combined Fund beneficiaries whose original assigned operator has gone out of business (and indeed Section 9704(f)(2)(B) confirms that the statute does not contemplate such reassignments), Congress must have intended to terminate the initial assignment process by September 30, 1993. Peabody Br. 32. Once again, the inference that Peabody attempts to draw does not follow either logically or from the statutory scheme. That Congress chose not to provide for the reassignment of beneficiaries once correctly assigned to a now-out-of-business operator says nothing about whether Congress wanted the initial assignment process to proceed to completion, even if it extended beyond September 30, 1993. The provision could just as easily imply, as the Trustees have argued, that Congress wanted to ensure that there was one *valid* initial assignment for as many Combined Fund beneficiaries as possible and that thereafter the statutory scheme would run its course, without any "second" assignments. This view is supported by Section 9706(f)'s authorization of as many appeals and reassignments as might be needed to get a particular beneficiary's assignment right.

D. The Failure Of The Rockefeller Amendment Does Not Indicate That The Congress That Enacted The Coal Act Intended The October 1, 1993 Date To Be Jurisdictional.

The Coal Act's historical context and legislative history leave no doubt that "unassigned beneficiaries" were meant to be only Combined Fund "orphans," *i.e.*, beneficiaries that were not assignable under Section 9706(a)'s substantive criteria. Congress sought in the statute to resolve the key problem that undermined the collectively bargained multiemployer health care system, namely, a majority of beneficiaries having no employment connection with any of the contributing employers. Accordingly, Congress arranged to assign as many retirees as possible to specific former employers, and thus to minimize the number of unassigned beneficiaries whose health care would need to be financed by alternative means.

Finding no legitimate way to rebut this reading of the Coal Act and its historical background, Bellaire suggests that Senator Rockefeller's failed effort to amend the Coal Act in 2000 to eliminate the phrase "before October 1, 1993" from Section 9706(a) somehow supports Bellaire's interpretation. Bellaire Br. 40. As Bellaire itself observes, however, legislative activity subsequent to a statute's enactment forms "an unreliable basis for discerning the intent of an earlier Congress." Bellaire Br. 41; *Consumer Prod. Safety Comm'n v. GTE*, 447 U.S. 102, 118 n.13 (1980) ("[S]ubsequent legislative history will rarely override a reasonable interpretation of a statute that can be gleaned from its language and legislative history prior to its enactment.").

This is especially so when the later legislative activity involves an unenacted amendment. As this Court has explained, "it is a particularly dangerous ground on which to rest an interpretation of a prior statute when it concerns, as it does here, a proposal that does not become law." *Pension*

Benefit Guar. Co. v. LTV Corp., 496 U.S. 633, 650 (1990). Inaction by Congress lacks "'persuasive significance' because 'several equally tenable inferences' may be drawn from such inaction, 'including the inference that the existing legislation already incorporated the offered change.'" *Id.*

V. RESPONDENTS' PROFFERED POLICY JUSTIFICATIONS FOR THEIR INTERPRETATION OF THE COAL ACT ARE BOTH UNSUPPORTED AND INSUPPORTABLE.

Respondents purport to discern in the Coal Act a legislative plan to provide assigned operators with certainty regarding the extent of their statutory obligations, to do "rough justice" rather than engage in an extended beneficiary assignment process, to avoid annual recalculations of premium assessments, and generally to protect operators at the expense of the AML Fund. This is sheer fiction. Nothing in the text of the statute, its avowed purpose, its historical background, or its legislative consideration supports the alleged objectives that respondents would read into the Coal Act.

More than 150 years ago, this Court counseled that "[i]n expounding a statute, we must not be guided by a single sentence or member of a sentence, but look to the provisions of the whole law, and to its object and policy." *United States v. Heirs of Boisdore*, 49 U.S. (8 How.) 113, 122 (1849). The Court has repeated this injunction "[o]ver and over" in the ensuing years. *United States Nat. Bank of Ore. v. Independent Ins. Agents of America, Inc.*, 508 U.S. 439, 455 (1993), quoted in *Regions Hospital*, 522 U.S. at 460 n.5. *See also, e.g., Weinberger v. Hynson, Westcott & Dunning, Inc.*, 412 U.S. 609, 631-32 (1973) ("It is well established that our task in interpreting separate provisions of a single Act is to give the Act 'the most harmonious, comprehensive meaning possible' in light of the legislative policy and purpose.")).

Viewed from this perspective, the interpretation here advocated by the Commissioner and the Trustees is much superior to that advanced by respondents.

Bellaire contends that Congress sought to avoid an assignment process "laden with risk of uncertainty for beneficiaries and operators alike." Bellaire Br. 25. Bellaire never identifies just what this risk is, and its assertion that an extended assignment process would pose a risk to beneficiaries is directly at odds with respondents' mantra that all Combined Fund beneficiaries will receive their intended health benefits regardless of the outcome of this dispute. Moreover, Bellaire finds no support for its theorizing anywhere in the Coal Act's text or legislative history. Bellaire criticizes the Trustees' reliance on the Coal Act's overarching purpose and legislative history on the ground that this approach might elevate the views of a few legislators over the collective view of Congress, especially given the controversial nature of the Coal Act. Bellaire Br. 39-40. The criticism rings hollow because, despite the extensive debate and compromise, Bellaire cannot point to even one comment by one legislator (or even one lobbyist) to show that certainty and repose for coal operators were ever a concern. By contrast, the Trustees' policy arguments are well-supported by the Coal Act's text, legislative history, and historical context.

Nor can respondents muster any argument that they were prejudiced in any way by the date of the assignments at issue. They are being asked to pay only what Congress intended them to pay, and not a penny more. *See Exxon Chem. Patents, Inc. v. Lubrizol Corp.*, 935 F.2d 1263, 1267-68 (Fed. Cir. 1991) (Newman, C.J., concurring) (the distinction between mandatory and directory statutory provisions "turns on whether the manner or time of performing the act is so critical to the statutory subject matter that any deviation can 'injuriously affect' the rights of

interested persons"); 3 NORMAN J. SINGER, SUTHERLAND ON STATUTES AND STATUTORY CONSTRUCTION § 57:18, at 58-59 (6th ed. 2001) ("The general rule is that if a provision of a statute states a time for performance of an official duty, without any language denying performance after a specified time, it is directory," unless "the time period is provided to safeguard someone's rights . . . .").

Bellaire alleged in its Complaint that SSA's assignments made after September 30, 1993 "caused [Bellaire] to incur premium obligations and other expenses and harm that it would not have incurred if the Commissioner had properly performed his duties under Section 9706 of the Coal Act." J.A. 86, ¶ 64. Bellaire never adduced any evidence in support of this allegation, however, and there is none. Bellaire is being asked to pay the exact same amount today that it would have been asked to pay if SSA had made all of the initial assignments before October, 1, 1993. Thus, there appears "no need to provide [coal operators] with any remedy at all—much less the drastic remedy respondents seek in this case" for SSA's failure to meet the statutory date. *Pierce County*, 476 U.S. at 260 n.7.

Holding that the October 1, 1993 date is not jurisdictional does not sanction an endless assignment process. Bellaire Br. 25. If for some reason Bellaire had a perceived need to know by a time certain the total number of beneficiaries who eventually would be assigned to it, it could have petitioned a court to "compel agency action unlawfully withheld or unreasonably delayed" under the Administrative Procedure Act, 5 U.S.C. §§ 702, 706(1). *Pierce County*, 476 U.S. at 260 n.7. Indeed, "the 'proper remedy' of a party seeking to enforce a statutory deadline is not to challenge the legitimacy of post-deadline agency actions, but 'to apply for a court order compelling the [agency] to act.'" *In re Barr Labs., Inc.*, 930 F.2d 72, 74 (D.C. Cir. 1991) (quoting *Fort Worth Nat'l Corp., v. FSLIC*, 469 F.2d 47, 58 (5th Cir. 1972)).[5]

By stating that SSA's notices of assignment did not distinguish between initial assignments and reassignments (Bellaire Br. 9-10), Bellaire appears to imply that it did not seek relief under the APA because it was unaware that some of the beneficiaries assigned in 1995 were initial assignments. Bellaire does not contend, however, that it did not, in fact, receive information during the appeals process that should have put it on notice that some of the beneficiaries were initial assignments. Nor does Bellaire explain why it was able to compile a list for the Complaint that identified persons believed to be assigned after the statutory date, but was unable to access such information in 1995. J.A. 83-84, Compl., ¶ 60. Bellaire does not dispute that, upon request, SSA would have disclosed whether an assignment was an original assignment or a reassignment. J.A. 138, Answer of Def. Apfel ¶ 61. If Bellaire ever had made such inquiries, it could have taken early advantage of the APA procedure to protect any legitimate interest it might have had in certainty and finality.[6]

5/ Notably, decisions addressing whether to compel agency action after a statutory date do not question the agency's authority to act after that date. *E.g., Forest Guardians v. Babbitt*, 174 F.3d 1178 (10th Cir. 1999) (directing agency that had missed statutory deadline to comply "as soon as possible"); *Environmental Def. Ctr. v. Babbitt*, 73 F.3d 867 (9th Cir. 1995) (where EPA missed one-year deadline for listing endangered species, directing agency to make final determination within a reasonable time after appropriated funds were made available); *In re Barr Labs.*, 930 F.2d at 74 (refusing to enforce 180-day deadline on FDA's processing of generic drugs).

6/ Elgin's *amicus* brief consists largely of inappropriate factual contentions that are unsupported in the record and that cannot be judicially noticed. Elgin Br. at 2-8; *see Werner v. Werner*, 267 F.3d 288, 295 (3d Cir. 2001) (refusing to judicially notice truth of a memorandum). Elgin suggests that SSA would withhold or delay disclosing information

VI. AT MINIMUM, THE COMMISSIONER'S INTERPRETATION OF SECTION 9706(a) IS ENTITLED TO DEFERENCE.

Even if all of the foregoing arguments, and this Court's own prior decisions on the effect of statutorily prescribed dates, are insufficient to *require* a ruling in favor of the Commissioner, they demonstrate at minimum that the statutory language is ambiguous and that the Court should defer to the interpretation of the Commissioner, the officer charged by statute with the task of assigning Combined Fund beneficiaries. This Court has not limited *Chevron*-deference to regulations passed pursuant to an agency's rule-making authority. *See* cases cited in Trustees Br. 48 n.39. But even if the less deferential *Skidmore* standard applies, SSA's interpretation of the Coal Act should be upheld. *See United States v. Mead Corp.*, 533 U.S. 218, 237-38 (2001) (level of deference under *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944), depends on the agency's care, consistency, formality, relative expertness, and persuasiveness of agency's position).

Bellaire asserts, as if it were uncontested fact, that at some point in 1995 the Commissioner changed her position about SSA's ability to make initial beneficiary assignments after September 30, 1993. Bellaire then declares that "[t]o this day no explanation has been given why the agency's interpretation of the law changed in 1995." Bellaire Br. 42. No explanation was needed, because no "change" occurred. SSA never adopted the position that it was precluded from making initial assignments on or after October 1, 1993. Bellaire cites a snippet from congressional hearing testimony

---

that would clarify when each assignment was made. Elgin Br. 3-4. The only evidence in the record is to the contrary. *See* J.A. 28-47 (SSA's response to Peabody's request for information). In any event, Elgin's purported grievance does not bear on the statutory interpretation issue before the Court.

in September 1993 in which Acting Commissioner Lawrence H. Thompson stated that he expected SSA to complete the assignment process by the "statutory due date" of October 1, 1993. Bellaire Br. 9, 42-43. This appears to be no more than an overly optimistic forecast to Congress, not a statement of SSA policy. It also is not consistent with other information—that "[e]xtra resources would be needed to complete the assignments by the October 1, 1993 target date"—that the agency communicated to the House Ways and Means Committee at about the same time. Trustees Br. 16. The Acting Commissioner's subsequent statement in 1995 that the initial assignment process had been completed by October 1, 1993, also is not an agency policy statement and does not address the issue in this case. It does not say that SSA would not make any more initial assignments if the agency was able to do so.

The history of SSA's interpretation is explained in the Declaration of Richard Harron, Director of the Division of Coverage and Support for SSA (J.A. 179-84), and it does not involve any change of position. In November 1992, the Trustees of the 1950 Benefit Plan and the 1974 Benefit Plan compiled a list of approximately 86,000 miners who were identified as eligible for assignment under the provisions of the Coal Act. SSA was required to perform the massive task of reviewing the records and matching the miners with appropriate companies under Section 9706's criteria. J.A. 180-81, ¶¶ 3-4. By September 30, 1993, SSA had made an initial determination that 20,005 miners could not properly be assigned to specific operators based on information available at that time. Because SSA recognized that many of the unassigned beneficiaries could be assigned, however, it continued to work on implementing the Coal Act after October 1, 1993. J.A. 182, ¶¶ 6- 7.

In November 1993, the Combined Fund informed SSA that a random sampling of unassigned miners showed

that many properly could be assigned to specific coal operators. SSA determined that the employment histories of the initially unassigned miners should be reviewed, but the agency's workload resources at that time had to be directed to responding to the numerous appeals. Due to technology issues, SSA could not begin reviewing the initially unassigned miners until 1995. In June and September 1995, SSA sent notices of assignment regarding previously unassigned miners to various coal operators. J.A. 183-84, ¶¶ 8-9.

The decision to continue making initial assignments after September 30, 1993 was based on SSA's "understanding that Congress intended SSA to assign the greatest number of miners to appropriate coal operators and to limit, as much as possible, the number of unassigned beneficiaries." J.A. 182, ¶ 7. This is a more than reasonable interpretation of the Coal Act, which SSA consistently has applied.

Under Bellaire's unreasonable view, SSA could make reassignments based on new information submitted during the appeals process, for example, but was required to ignore such new information about beneficiaries whom SSA had not been able previously to assign. Such an interpretation would artificially inflate the number of Combined Fund orphans. The Coal Act's text, structure, legislative history, and historical context all point to a contrary intent. As the Fourth Circuit concluded in *Pardee,* "Congress intended the status of individual beneficiaries to depend not on the vicissitudes of bureaucratic action, but instead on the merits, i.e., whether an extant operator could be identified and held responsible." 269 F.3d at 437.

CONCLUSION

For these reasons, and those set forth in the Trustees' opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted,

John R. Mooney
Elizabeth A. Saindon
MOONEY, GREEN, BAKER & SAINDON, P.C.
1920 L Street, N.W., Suite 400
Washington, D.C. 20036
(202) 783-0010

Peter Buscemi
Counsel of Record
Anne Brafford
MORGAN, LEWIS & BOCKIUS LLP
1111 Pennsylvania Ave., N.W.
Washington, D.C. 20004
(202) 739-5190

David W. Allen
Jonathan Sokolow
Office of the General Counsel
UMWA HEALTH & RETIREMENT FUNDS
2121 K Street, N.W.
Washington, D.C. 20037
(202) 521-2220

July 22, 2002

(13) Nos. 01-705, 01-715 (17)

In The Supreme Court of the United States

GRANTED

Supreme Court, U.S.
FILED
OCT 3 2002
OFFICE OF THE CLERK

JO ANNE B. BARNHART,
Commissioner of Social Security,
Petitioner,

v.

PEABODY COAL COMPANY, *et al.*,
Respondents.

MICHAEL H. HOLLAND, *et al.*, as Trustees of the United Mine Workers of America Combined Benefit Fund,
Petitioners,

v.

BELLAIRE CORPORATION, *et al.*,
Respondents.

On Writs Of Certiorari to the United States Court of Appeals for the Sixth Circuit

---

SUPPLEMENTAL BRIEF FOR PETITIONERS THE TRUSTEES OF THE UMWA COMBINED BENEFIT FUND

JOHN R. MOONEY
ELIZABETH A. SAINDON
MOONEY, GREEN, BAKER, and SAINDON, P.C.
1920 L Street, NW, Suite 400
Washington, DC 20036
(202) 783-0010

DAVID W. ALLEN
JONATHAN SOKOLOW
Office of the General Counsel
UMWA HEALTH & RETIREMENT FUNDS
2121 K Street, NW
Washington, D.C. 20037
(202) 521-2220

PETER BUSCEMI
Counsel of Record
ANNE BRAFFORD
MORGAN, LEWIS & BOCKIUS LLP
1111 Pennsylvania Avenue, N.W.
Washington, D.C. 20004
(202) 739-5190

24 pp

In The Supreme Court of the United States

No. 01-705

JO ANNE B. BARNHART,
Commissioner of Social Security,
Petitioner,

v.

PEABODY COAL COMPANY, *et al.*,
Respondents.

No. 01-715

MICHAEL H. HOLLAND, *et al.*, as Trustees of the United Mine Workers of America Combined Benefit Fund,
Petitioners,

v.

BELLAIRE CORPORATION, *et al.*,
Respondents.

On Writs Of Certiorari to the United States Court of Appeals for the Sixth Circuit

SUPPLEMENTAL BRIEF FOR PETITIONERS THE TRUSTEES OF THE UMWA COMBINED BENEFIT FUND

Pursuant to Rule 25.5 of the Rules of this Court, Petitioners the Trustees of the UMWA Combined Benefit Fund submit this supplemental brief to bring to the Court's attention the recent decision of the Third Circuit in *Shenango Inc. v. Apfel*, No. 00-2525 (3d Cir. Sept. 24, 2002).

Shenango involved, *inter alia*, the same question presented in these consolidated cases, namely, whether the Commissioner of Social Security retained authority to make certain initial assignments of Combined Fund beneficiaries on or after October 1, 1993. In a decision reproduced as an appendix to this brief, the Third Circuit answered this question in the affirmative. The court expressly declined to follow the Sixth Circuit's decision in *Dixie Fuel Co. v. Commissioner of Social Security*, 171 F.3d 1052 (6th Cir. 1999), which the court of appeals in the present cases treated as controlling and on which respondents continue to rely. Instead, the Third Circuit aligned itself with the Fourth Circuit's decision in *Holland v. Pardee Coal Co.*, 269 F.3d 424 (4th Cir. 2001), *cert. pending*, No. 01-1366 (docketed Mar. 18, 2002), and concluded after a review of the Coal Act's text, and the statute's background, structure, and purpose, that the Commissioner retained the authority to make the initial beneficiary assignments at issue.

In reaching this result, the Third Circuit explained that a statutory date, standing alone, does not strip an agency of its authority to act after the date has passed. Instead, relying on this Court's decisions in *Brock v. Pierce County*, 476 U.S. 253 (1986), and *United States v. James Daniel Good Real Property*, 510 U.S. 43 (1993), the Third Circuit looked to see whether the Coal Act provided any other indication that Congress intended to deprive the Commissioner of authority to make initial beneficiary assignments after September 30, 1993. *See Shenango*, App. at 29a-31a. The court found that Congress did not bar the Commissioner from making assignments after September 30, 1993, and did not provide that any such assignments would be invalid. Nor did Congress "specify a consequence" for the agency's failure to complete the assignment process before October 1, 1993.

Id. at 31a-32a. Under these circumstances, the court concluded, the Commissioner did not lose power to act after September 30, 1993.

The Third Circuit derived further support from the Coal Act's structure and purpose. As the court stated, "the Coal Act's key objective is to ensure that the costs of providing retirement benefits will, so far as possible, be borne by the private parties most responsible for creating retired miners' expectations of lifetime health benefits." *Id.* at 35a. To achieve that result, Congress sought to ensure that as many Combined Fund beneficiaries as possible would be assigned to coal wage agreement signatories and their related persons, and that the number of unassigned beneficiaries would be kept to a minimum. *Id.* at 36a. The Third Circuit therefore held that "to invalidate post-October 1, 1993 assignments would eviscerate a program intended to impose funding burdens on the most responsible parties" and would create a "financial windfall" for some operators at the expense of others. *Id.*

Finally, the Third Circuit remarked that, "putting aside the intricacies of statutory interpretation and legislative history," it would have reached the same result "by employing that all too often overlooked tool: practical common sense." *Id.* The Third Circuit stated that the Coal Act imposed on the Commissioner the monumental task of reviewing the work history of tens of thousands of retired coal miners in a relatively short time, and that Congress further complicated this task by not appropriating the necessary funds until less than 80 days before the October 1, 1993 statutory date. *Id.* As the Third Circuit remarked, "[i]t would therefore have been as close to impossible as any administrative task can get for the Commissioner to complete the [review of] 65,000 [work histories] by October 1, 1993." *Id.* Against this background, the court concluded, citing this Court's decision

in *Regions Hospital v. Shalala*, 522 U.S. 448 (1998), that SSA retained authority to make initial beneficiary assignments under the Coal Act after October 1, 1993. App. at 37a.

Respectfully submitted,

JOHN R. MOONEY
ELIZABETH A. SAINDON
MOONEY, GREEN, BAKER, and SAINDON, P.C.
1920 L Street, NW, Suite 400
Washington, DC 20036
(202) 783-0010

PETER BUSCEMI
Counsel of Record
ANNE BRAFFORD
MORGAN, LEWIS & BOCKIUS LLP
1111 Pennsylvania Avenue, N.W.
Washington, D.C. 20004
(202) 739-5190

DAVID W. ALLEN
JONATHAN SOKOLOW
Office of the General Counsel
UMWA HEALTH & RETIREMENT FUNDS
2121 K Street, NW
Washington, D.C. 20037
(202) 521-2220

October 3, 2002

APPENDIX

APPENDIX

UNITED STATES COURT OF APPEALS
THIRD CIRCUIT

[Filed Sept. 24, 2002]

No. 00-2525

SHENANGO INCORPORATED; STELCO USA, INC.; STELCO COAL COMPANY; MUELLER INDUSTRIES, INC.,

Appellants,

v.

KENNETH S. APFEL, Commissioner of Social Security; MICHAEL H. HOLLAND; WILLIAM P. HOBGOOD; MARTY D. HUDSON; THOMAS O.S. RAND; ELLIOT A. SEGAL; CARL E. VANHORN; GAIL R. WILENSKY, Trustees of the United Mine Worker of America Combined Benefit Fund

---

Before SLOVITER, NYGAARD and McKEE, *Circuit Judges*.

OPINION OF THE COURT

MCKEE, *Circuit Judge*.

Shenango, Inc., Stelco USA, Inc., Stelco Coal Co. and Mueller Industries (hereinafter collectively referred to as the "Companies") challenge the Commissioner of Social Security's assignment of responsibility for health care premiums of approximately 70 retired miners and their qualified dependents pursuant to the Coal Industry Retiree Health Benefit Act of 1992 (the "Coal Act"), 26 U.S.C. §§ 9701-9722. The Companies argue that the Act is unconstitutional as applied to them pursuant to *Eastern Enterprises v. Apfel*, 524 U.S. 498 (1988). For the reasons that follow, we conclude that the

assignments are not unconstitutional as applied, and that the district court did not err in dismissing the Companies' challenge to the assignments. However, before we explain our reason, it will be helpful to explain the historical background and context of this dispute.

I. THE COAL ACT

The Coal Act was enacted in 1992 "to ensure that retired coal miners and their dependents would continue to receive the health and death benefits they had been receiving since the 1940s pursuant to a series of collective bargaining agreements." *Anker Energy Corp. v. Consolidation Coal Co.*, 177 F.3d 161, 163-64 (3d Cir.1999). Because the origins and history of the Coal Act are set forth in great detail in the Supreme Court's opinion in *Eastern Enterprises*, as well as in our opinions in *Unity Real Estate v. Hudson*, 178 F.3d 649 (3d Cir.1999), and *Anker Energy*, we need not repeat it here. Rather, we offer the following narrative from our opinion in *Anker Energy* as background for our analysis:

> In 1947, the United Mine Workers of America ("UMWA") and the Bituminous Coal Operators' Association ("BCOA") agreed upon the first of a series of National Bituminous Coal Wage Agreements ("NBCWA" or "wage agreement"), which specified the terms and conditions of employment and provided health and pension benefits for miners. The 1947 NBCWA established the United Mine Workers of America Welfare and Retirement Fund [W & R Fund], which used the proceeds of a royalty on coal production to provide pension and medical benefits for miners and their families. The 1947 NBCWA did not specify the benefits to which miners and their families were entitled, instead leaving this task to three trustees in charge of the Fund. In 1950 the union and the industry association agreed upon a new NBCWA that created a new Fund financed by a per ton levy on coal mined by signatory

> operators. Like the 1947 Fund, the 1950 version did not promise specific benefits, and the benefits were always subject to cancellation or change.
>
> This system did not change significantly until 1974 when, to comply with the newly enacted [Employee Retirement Income Security Act], the UMWA and the BCOA negotiated a new wage agreement that created four trusts funded by royalties on coal production and premiums based on hours worked by miners. Under the new agreement, the 1950 Benefit Plan covered miners who retired before January 1, 1976, and their dependents, while the 1974 Benefit Plan covered miners who retired after 1975 and their dependents. Both Plans provided nonpension benefits, including medical benefits.
>
> The 1974 NBCWA explained that it was amending the previous system to provide health benefits for retired miners "for life," and to their widows until death or remarriage. Because of this broadened coverage the number of eligible benefit recipients increased dramatically, and the Plans began losing money.
>
> In response, the 1978 NBCWA assigned responsibility to signatory employers for the health care of their own active and retired employees. The 1978 agreement also restricted the 1974 Plan so that it would provide health benefits only for "orphaned" retirees, those whose last employer had gone out of business or otherwise ceased contributing to the Plans. To ensure the Plans' solvency, the 1978 NBCWA included a "guarantee" clause that obligated signatories to make sufficient contributions to maintain benefits during that agreement, and the union and operators amended the Plans to include "evergreen clauses" that required signatories to contribute to the Plans if they remained in the coal business even if they never signed another wage agreement.

> Despite the 1978 NBCWA and subsequent attempts to improve the Plans, they continued to lose money because of the increase in beneficiaries, the escalating costs of health care, and the flood of signatory companies abandoning the Plans. In 1992 Congress responded by passing the Coal Act.

177 F.3d at 164-165.

In enacting the Coal Act, Congress declared that the Act was intended to remedy problems with funding retiree health benefits in the coal industry, to allow for sufficient operating assets for the health benefit plans, and to provide for the continuation of a privately funded and self-sufficient program for the delivery of health care benefits to retired miners and their dependents. Pub.L. No. 102-486, § 19142(b), 106 Stat. 3036, 3037 (1992), 26 U.S.C. § 9701 note. Accordingly, the Act required certain benefit plans previously established under the UMWA collective bargaining agreements to be merged into a new plan--the United Mine Workers of America Combined Benefit Fund.[1] 26 U.S.C. § 9702(a). The Combined Fund provides health and death benefits to retired coal miners and dependents who, as of July 20, 1992, were eligible to receive, and were receiving, benefits under the UMWA 1950 or 1974 benefit plans. 26 U.S.C. §§ 9703(a), (b)(1), (c), (e) & (f). Benefits paid through the Combined

[1] The Combined Fund is one of three components formulated by Congress to achieve the purposes of the Coal Act. The second component is the mandated continuation of individual employer health plans maintained by signatories to the 1978 and later NBCWAs. 26 U.S.C. § 9711. The third component is the 1992 Plan which provides benefits for persons who, but for the enactment of the Coal Act, would have been eligible to receive benefits from the UMWA 1950 or 1974 benefit plans, but who are not eligible for benefits from the Combined Fund. It also provides benefits for persons who are entitled to receive benefits directly from their former employers but who do not in fact receive such benefits. 26 U.S.C. § 9712. The second and third components are not implicated in this appeal. We are only concerned with the Combined Fund.

Fund are funded in part by premiums imposed on "signatory coal operators," *i.e.*, certain coal operators that employed an eligible beneficiary and had signed a collective bargaining agreement between the UMWA and BCOA, a multiemployer group of coal producers, or other "related persons" connected to the signatory operator by common ownership or control. *See* 26 U.S.C. §§ 9701(c)(1) & (c)(2), 9704, 9706.

The Act directs the Commissioner of Social Security[2] to assign each individual beneficiary to one of these signatory coal operators or its "related person." The assignment is determined by the length of the beneficiary's service, the date of service, and whether the employer signed national collective bargaining agreements with the UMWA in 1978 or later. 26 U.S.C. § 9706(a). The Act establishes a three tier mechanism for making assignments that we have described as the "linchpin" of the Coal Act's statutory scheme. *Unity Real Estate Co. v. Hudson,* 178 F.3d at 654. The Act provides in relevant part:

> (a) In general.—For purposes of this chapter, the Commissioner of Social Security shall, before October 1, 1993, assign each coal industry retiree who is an eligible beneficiary to a signatory operator which (or any related person with respect to which) remains in business in the following order:
>
> (1) First, to the signatory operator which—
>
> (A) was a signatory to the 1978 coal wage agreement or any subsequent coal wage agreement, and

[2] Originally, the Coal Act provided that the Secretary of Health and Human Services would be responsible for the assignment of Combined Fund beneficiaries. The Secretary delegated this task to the Commissioner of Social Security. In 1994, Congress transferred the statutory responsibility directly to the Commissioner. *See* Social Security Independence and Program Improvements Act of 1994, Pub.L.No. 10-3-296, §§ 105(a)(2)(A), 108(h)(9)(A), 108 Stat. 1472, 1487-88 (1994).

(B) was the most recent signatory operator to employ the coal industry retiree in the coal industry for at least 2 years.

(2) Second, if the retiree is not assigned under paragraph (1), to the signatory operator which—

(A) was a signatory to the 1978 coal wage agreement or any subsequent coal wage agreement, and

(B) was the most recent signatory operator to employ the coal industry retiree in the coal industry.

(3) Third, if the retiree is not assigned under paragraph (1) or (2), to the signatory operator which employed the coal industry retiree in the coal industry for a longer period of time than any other signatory operator prior to the effective date of the 1978 coal wage agreement.

26 U.S.C. § 9706(a)(1), (2) & (3). Once the Commissioner makes the assignment under § 9706, the assignee must then pay the annual premiums to the Combined Fund based on the amounts required to provide health and death benefits for the assigned beneficiaries.

If a miner or his[3] dependents cannot be assigned under this scheme, his benefits are funded by either asset transfers from one of the Combined Fund's predecessor benefit plans, *see* 26 U.S.C. § 9705(a)), transfers from the U.S. Treasury's Abandoned Mine Land Reclamation Fund, *see* 26 U.S.C. § 9705(b), 30 U.S.C. § 1232(h); or, if those sources are insufficient or unavailable, an additional unassigned—or "orphaned"—retiree premium that the Act imposed on all signatory operators. *See* 26 U.S.C. §§ 9704(d), 9705(a)(3)(B), 9705(b)(2).

[3] Inasmuch as it is highly unlikely that any women were employed as miners during the relevant period, we will use the masculine pronouns in referring to all miners.

The Coal Act also contains several provisions that, taken together, treat a commonly controlled group of related corporations as a single employer for purposes of liability under the statute. Pursuant to those provisions, the original employer and a wide range of affiliated companies or successors are potentially liable for premiums on miners' benefits under the Act. The Commissioner can assign responsibility for paying premiums for a miner's benefits either to a mine operator that actually employed an eligible beneficiary and signed a collective bargaining agreement between the UMWA and the BCOA ("signatory operator"), or to any "related person." 26 U.S.C. § 9706(a). The Act defines "related person" to include all members of a commonly controlled group of corporations including the signatory, other businesses under common control with the signatory, and subsequent successors in interest to any of those affiliated entities. 26 U.S.C. § 9701(c)(2)(A)). A "controlled group" is in turn defined as a group of companies in which a common parent or concentration of individual economic interests owns or controls more than 50% of each of the affiliated companies. *See* 26 U.S.C. § 9701(c)(2)(A), incorporating by reference 26 U.S.C. § 52(a) & (b), which in turn incorporates by reference 26 U.S.C. § 15563(a). The determination of which entities are "related persons" under the Coal Act turns on an entity's status with regard to the miner or the miner's employer as of July 20, 1992. 26 U.S.C. § 9701(c)(2)(B).

"Related persons" have broad and shared responsibility for premiums. Under the Act, any company within the commonly controlled group may be treated as having employed a related signatory's miners. 26 U.S.C.§ 9706(b). In addition, related persons are "jointly and severally liable for any premium required to be paid" by its affiliated signatory operator. 26 U.S.C. § 9704(a). Congress instructed the Commissioner to promptly assign miners to various companies according to this three tiered scheme promptly after the Coat Act's 1992

enactment. The statute states: "For purposes of this chapter, the Commissioner of Social Security shall, before October 1, 1993, assign each coal industry retiree who is an eligible beneficiary to a signatory operator. . . ." 26 U.S.C. § 9706(a).

II. THE COMMISSIONER'S ORIGINAL ASSIGNMENTS

The Companies were collectively assigned responsibility for premiums for approximately 70 miners and qualifying dependents pursuant to the third tier of the assignment scheme. 26 U.S.C. § 9706(a)(3). The Companies did not employ any of the miners thus assigned. Rather, the Commissioner assigned the miners based upon the Companies' relationships to other entities that had employed the miners.[4]

---

[4] The exact relationship between each plaintiff and its related entities is as follows:

Shenango merged with Lucerne Coke Co. sometime after 1971. Lucerne last signed an NBCWA in 1971. That agreement expired in November, 1974. Lucerne employed the miners assigned to Shenango, but Lucerne is no longer in business. However, as of July 20, 1992, Shenango was related, via its parent company, to Aloe Coal Co. which signed NBCWAs in 1974 and later.

Stelco Coal Co. mined coal under the name of Mather Collieries, which permanently ceased operating sometime before 1964. Stelco USA, Inc., is commonly owned with Stelco Coal Co. Mather signed several NBCWAs. It signed the last one in 1959. Mather employed the miners assigned to Stelco Coal and Stelco USA. As of July 20, 1992, Stelco Coal and Stelco USA were related to Pikeville Coal Company, which signed the 1974 and subsequent. NBCWAs.

In December, 1980, Mueller Industries, Inc., merged with Sharon Steel Corp., Sharon had previously merged with Joanne Coal Co., and Joanne Coal continued mining until approximately 1969. Joanne Coal last signed a NBCWA in 1964. Joanne Coal employed the miners assigned to Mueller. As of July 20, 1992, Mueller was related to Carpentertown Coal & Coke Co., and to United States Fuel Co. Carpentertown Coal signed the 1978 NBCWA and later NBCWAs.

The Commissioner originally assigned liability on the grounds that the Companies were "related" to a now-defunct employer that had signed a pre-1974 NBCWA. Specifically, Mueller was assigned liability with respect to employees of Joanne Coal because Joanne Coal signed a 1964 wage agreement. Then, Joanne Coal merged with Sharon Steel which subsequently merged with Mueller. Shenango received assignments with respect to employees of Lucerne Coke, an employer that signed a 1971 wage agreement and later merged with Shenango. Stelco USA and Stelco Coal received assignments with respect to employees of Mather Colliers because Mather signed a 1959 wage agreement. Stelco Coal mined coal under the name of "Mather". Stelco USA and Stelco Coal are commonly owned.

The Commissioner's assignments to Stelco Coal and Shenango were made before October 1, 1993. The assignments to Mueller Industries, Inc., were made sometime after that date.

The Companies concede that they are "related persons" as defined in the Act, 26 U.S.C. § 9701(c)(2)(A). They concede that they are related to the coal companies that actually employed the miners assigned to the Companies, signed pre-1974 NBCWAs and that are now out of business. They also concede that they are related to the coal companies that employed an entirely different set of miners and that signed post-1974 NBCWAs. The Companies differentiate between these two groups by referring to them as "Pre-1974 Signatories" and "Post-1974 Signatories."

III. *EASTERN ENTERPRISES* AND THE COMMISSIONER'S RESPONSE

As is often the case under the Coal Act, the challenge to the Commissioner's assignments here rests in large part upon our interpretation of *Eastern Enterprises*. The Court there considered the constitutionality of the Coal Act as applied to

Eastern. That company had mined coal until 1965, and signed every NBCWA from 1947 until 1964. The Commissioner assigned Eastern liability for over 1000 miners pursuant to 26 U.S.C. § 9706(a)(3), based upon Eastern's status as the pre-1978 signatory operator for whom the miners had worked the longest. The total liability for those assignments was estimated to be between $50 and $100 million. Eastern sued claiming that § 9706(a)(3) was unconstitutional as applied to it because the Act's imposition of liability violated the Due Process and Takings Clauses of the Fifth Amendment.

A four-justice plurality of the Supreme Court agreed that the Act violated the Takings Clause as applied to Eastern Enterprises. *Eastern Enterprises*, 524 U.S. at 537. While recognizing that a takings analysis is "essentially ad hoc and fact intensive," the plurality nonetheless identified three factors that are usually significant to assessing a Takings challenge under the Fifth Amendment: "the economic impact of the regulation, its interference with investment backed expectations, and the character of the governmental action." *Id.* at 523-524 (quoting *Kaiser Aetna v. United States*, 444 U.S. 164, 175 (1979)). The plurality then reviewed cases involving legislative schemes similar to the Coal Act; viz., the Black Lung Benefits Act and the Multiemployer Pension Plan Amendments Act ("MPPAA") which was enacted to supplement the Employee Retirement Income Security Act ("ERISA"). The justices concluded that those cases established:

> Congress has considerable leeway to fashion economic legislation, including the power to affect contractual commitments between private parties. Congress may also impose retroactive liability to some degree, particularly where it is confined to short and limited periods required by the practicalities of producing national legislation. *Our decisions, however, have left open the possibility that legislation might be unconstitutional if it*

> *imposes severe retroactive liability on a limited class of parties that could not have anticipated the liability, and the extent of that liability is substantially disproportionate to the parties' experience.*

Id. at 528-529 (citation and internal quotations omitted) (emphasis added).

Applying these principles to Eastern Enterprises, the plurality first focused on the economic impact of the Act and found that it placed a "considerable financial burden" on that company. *Id.* at 529. The financial burden was not a "permanent physical occupation of Eastern's property of the kind [usually] viewed as a *per se* taking[.]" However, the plurality noted that the Court's decisions upholding the MPPAA "suggest that an employer's statutory liability for multi-employer pension plans should reflect some proportionality to its experience with the plan." *Id.* at 530 (citation and internal quotations omitted). The plurality concluded that this proportionality was lacking insofar as the Coal Act was applied to Eastern. Eastern had contributed to the 1947 and 1950 W & R Funds, but "it [had] ceased it [sic] coal mining operations in 1965 and neither participated in negotiations nor agreed to make contributions in connection with the 1974, 1978, or subsequent NBCWAs." *Id.* This was significant because those latter agreements were the "first [to] suggest an industry commitment to funding lifetime health benefits for both retirees and their family members." *Id.* Thus, because Eastern had neither contemplated liability for lifetime benefits to miners nor contributed to the miners' expectations of lifetime benefits, the plurality found that "the correlation between Eastern and its liability to the Combined Fund is tenuous, and the amount assessed against Eastern resembles a calculation made in a vacuum." *Id.* at 531 (citation and internal quotations omitted).

The assignments to Eastern faired no better when the plurality considered the second and third factors it had culled

from the Court's Takings Clause jurisprudence. The Act's "substantial and particularly far reaching" retroactivity[5] interfered with Eastern's reasonable investment backed expectations. *Id.* at 534. The plurality reasoned that a coal industry employer could not have contemplated liability for lifetime benefits to miners until those provisions were included in the 1974 NBCWA. Therefore, "the Coal Act's scheme for allocation of Combined Fund premiums [was] not calibrated either to Eastern's past actions or to any agreement—implicit or otherwise—by the company." *Id.* at 536. Finally, the plurality found that the "nature of governmental action . . . is quite unusual," and "implicates fundamental principles of fairness underlying the Takings Clause," because it "singles out certain employers to bear a burden that is substantial in amount, based on the employers' conduct far in the past, and unrelated to any commitment that the employers made or to any injury they caused." *Id.* at 537.

Inasmuch as each of the three factors weighed against sustaining the "taking," the plurality concluded that the assignment to Eastern under the Act was unconstitutional.

Justice Kennedy, who provided the fifth vote striking down the application of the Act as to Eastern, disagreed with the plurality's analysis, but found that the Act's retroactivity violated due process. *Id.* at 539-50. He applied an "arbitrary and irrational" standard of review, *Id.* at 547, and focused on the fact that Eastern Enterprises had not signed a 1974 or later NBCWA. He concluded:

> Eastern was once in the coal business and employed many of the beneficiaries, but it was not responsible for their expectation of lifetime benefits or for the perilous condition of the 1950 and 1974 plans which put the benefits in jeopardy. As the plurality discusses in detail, the expectation was created by promises and agreements made long after Eastern left the coal business. Eastern was not responsible for the resulting chaos in the funding mechanism caused by other coal companies leaving the framework of the National Bituminous Coal Wage Agreement. *This case is far outside the bounds of retroactivity permissible under our law.*

[5] Coal Act assignments operate retroactively because they require an assignee to use current funds to provide benefits for miners after the assignee believed its liability to the miners had been settled. *See Eastern Enterprises*, at 534 (O'Connor, J.) ("[T]he Coal Act operates retroactively, divesting Eastern of property long after the company believed its liabilities under the 1950 W & R Fund to have been settled.").

Id. at 550 (emphasis added).

The four dissenting justices agreed with Justice Kennedy that the application of the Act did not violate the Takings Clause, but disagreed with his view that the Act violated due process. *Id.* at 556-67.

We have previously noted the "splintered nature" of the Court's decision, and remarked that it is "difficult to distill a guiding principle from *Eastern*." *Unity Real Estate Co.*, 178 F.3d at 658. However, as recited above, both the plurality and Justice Kennedy focused on one fact which each considered significant. The 1974, 1978 and subsequent NBCWAs were the first wage agreements containing a commitment to fund lifetime health benefits for retired miners and their dependents. Eastern Enterprises had not signed either the 1974 or the 1978 NBCWAs. Therefore, it could not have contemplated contributing to the miners' expectation of lifetime health benefits. *See Anker Energy Corp. v. Consolidation Coal Co.*, 177 F.3d at 172 ("[A]nalysis of the decisions in *Eastern Enterprises* leads us to the conclusion that a majority of the Court would find the Act unconstitutional when applied to an employer that did not agree to the 1974 or subsequent NBCWAs, while application of the Act to a signatory to the 1974 or subsequent wage agreement would be an entirely different matter."); *see also, Association of Bituminous Contractors, Inc. v. Apfel*, 156 F.3d 1246, 1257

(D.C. Cir.1998) ("The clear implication of each opinion in *Eastern Enterprises* is that employer participation in the 1974 and 1978 agreements represents a sufficient amount of past conduct to justify the retroactive imposition of Coal Act liability (for the dissenting justices, of course, such participation is not even necessary")).

After *Eastern Enterprises*, the Commissioner undertook a comprehensive review of all assignments that had previously been made under § 9706(a)(3), including those made to the Companies. The Commissioner reasoned that, under *Eastern Enterprises*, if neither the original employer nor related persons had signed the 1974 or later NBCWAs, the assignment could not be distinguished from *Eastern Enterprises*. Accordingly, the Commissioner, on his own initiative, voided hundreds of assignments that were based solely on an employer or related person's participation in a pre-1974 NBCWA.

However, the Commissioner also concluded that *Eastern Enterprises* allowed miners to be assigned to coal companies that where part of a controlled group of corporations that included entities that had signed post-1974 NBCWAs. These assignments were deemed to be materially different from the assignments in *Eastern Enterprises*. The plaintiff in *Eastern* was not statutorily related to another company that had signed 1974 and later NBCWAs. The Commissioner therefore concluded that *Eastern* did not address circumstances in which the assignee is related to both the original employer and another, affiliated company that signed collective bargaining agreements promising lifetime care. Accordingly, the Commissioner rejected the Companies' requests to vacate their assignments of the miners employed by the Pre-1974 Signatories.

IV. DISTRICT COURT PROCEEDINGS

On June 30, 1999, the Companies filed a five Count complaint against the Commissioner and the Trustees of the Combined Fund. In Count I, the Companies alleged that the Commissioner's refusal to vacate the Coal Act assignments of liability for miners employed by the Pre-1974 Signatories was unlawful under *Eastern Enterprises*. In Counts II and III, the Companies alleged that the Coal Act violates the Takings and Due Process Clauses of the Fifth Amendment as it applies to them. In Count IV, the Companies challenged the Commissioner's authority to make any assignments after September 30, 1993. In Count V, the Companies argued that because the Commissioner's assignments should be vacated for the reasons stated in the preceding four Counts, the Combined Fund is obligated to return all premium payments together with interest.

After engaging in an excellent and well-reasoned analysis, the district court granted the Commissioner's motion to dismiss Counts I through IV. Thereafter, the parties submitted their Joint Statement of Position informing the district court that the parties agreed that, given its dismissal of Counts I through IV, Count V was moot. Accordingly, the district court dismissed Count V as moot, and this appeal followed.[6]

V. DISCUSSION

The Companies assert two basic arguments. First, they argue that their position is essentially identical to the position of the plaintiff in *Eastern Enterprises* insofar as the Pre-1974

---

[6] We review *de novo* the district court's decision as to the constitutionality of the Coal Act as applied to the Companies. *Anker Energy Co. v. Consolidation Coal Co.*, 177 F.3d at 169. Although the district court granted the Commissioner's motion to dismiss under Fed.R.Civ.P. 12(b)(6), the parties apparently submitted documents outside the pleadings themselves; therefore the appropriate standard of review is the same as that for a motion for summary judgment, i.e., plenary review. *Smith v. Johns-Manville Corp.*, 795 F.2d 301, 306 (3d Cir.1986).

Signatories are concerned. The Companies claim that the Commissioner therefore violated the Due Process Clause in assigning them miners employed by the Pre-1974 Signatories. Second, they argue that the Commissioner exceeded his authority under § 9706(a) because he made some assignments after October 1,1993; the "cutoff" that Congress mandated in the Act. We will address each argument separately.

A. Are the Companies in a Substantially Identical Position to *Eastern Enterprises*?

As noted earlier, no single rationale emerges from the decision in *Eastern Enterprises*. Accordingly, "'the holding of the Court may be viewed as that position taken by those Members who concurred in the judgment on the narrowest grounds.'" *Marks v. United States*, 430 U.S. 188, 193 (1977) (quoting *Gregg v. Georgia*, 428 U.S. 153, 169 n.15 (1976)). The *Marks* rule is only applicable where "one opinion can be meaningfully regarded as 'narrower' than another" and can "represent a common denominator of the Court's reasoning." *Rappa v. New Castle County*, 18 F.3d 1043, 1057 (3d Cir. 1994) (quoting *King v. Palmer*, 950 F.2d 771, 781 (D.C. Cir. 1991) (en banc). "[W]here approaches differ, no particular standard is binding on an inferior court because none has received the support of a majority of the Supreme Court." *Anker Energy Corp.*, at 170 (citing *Rappa v. New Castle County*, 18 F.3d at 1058).

In *Unity Real Estate*, we stated that "Justice Kennedy's substantive due process reasoning is not a 'narrower' ground that we might take to constitute the controlling holding." 178 F.3d at 658. Consequently, the only binding aspect of the fragmented decision in *Eastern Enterprises* is its "specific result," i.e., the Act is unconstitutional as applied to Eastern Enterprises. *Anker Energy Corp.*, at 170 (citing *Association of Bituminous Contractors, Inc. v. Apfel*, 156 F.3d 1246, 1255 (D.C. Cir. 1998)). Or, as we said in *Unity Real Estate*: "*Eastern* . . . mandates judgment for the plaintiffs only if they

stand in a substantially identical position to Eastern Enterprises with respect to both the plurality and Justice Kennedy's concurrence."[7] 178 F.3d at 659.

Earlier, we noted that the Companies concede that under the Coal Act, they are "related persons" to two sets of entities, which they call the "Pre-1974 Signatories" and the "Post-1974 Signatories." Because of their "related person" status to the Post-1974 Signatories, the Companies were assigned premium liability for miners employed by the Pre-1974 Signatories.

The Companies concede that any assignments of Coal Act liability based on their status of being related persons to Post-1974 Signatories are constitutionally valid. Companies' Br. at 8. However, the Companies argue that they "stand in a substantially identical position to Eastern [regarding the pre-1974 Signatories] because, as in *Eastern*, all of the disputed miners worked for signatory operators who last signed [NBCWAs] before 1974." *Id.* at 9. In the Companies' view, the Pre-1974 Signatories and the Post-1974 Signatories are two discrete sets of entities that must be viewed differently under *Eastern Enterprises*. Therefore, according to the Companies, the constitutionality of the Coal Act as applied to any particular member of a controlled group of corporations depends upon whether the particular member signed a 1974 or later NBCWA, not upon whether any other member of the group did so. The Companies rely upon our decision in *Unity Real Estate* in claiming that their substantial identity to the Pre-1974 Signatories places them (the Companies) in the shoes of Eastern Enterprises, and the Commissioner's assignments of the miners employed by the Pre-1974 Signatories was therefore unconstitutional as to them.

---

[7] We also held in *Unity Real Estate* that because of the concurrence and dissent in *Eastern Enterprises*, "we are bound to follow the five-four vote against the takings claim. . . ." 178 F.3d at 659; *see also Anker Energy Corp.*, at 170 n.3.

The Companies make no other constitutional challenge to the assignments regarding the Pre-1974 Signatories. Therefore, their "as applied" constitutional challenge turns on whether they are in a "substantially identical position to Eastern Enterprises" with regard to assignments of the Pre-1974 Signatories. We hold that the circumstances here are not substantially equivalent to the circumstances in *Eastern Enterprises*, and the Commissioner's assignment of the Pre-1974 Signatories was therefore not a violation of the Fifth Amendment. A closer examination of *Eastern Enterprises* shows why.

Eastern Enterprises began operations in 1929 and it mined coal in West Virginia and Pennsylvania until 1965. *Eastern*, 524 U.S. at 516. In that capacity, it was a signatory to each NBCWA executed between 1947 and 1964 and made contributions of over $60 million to the 1947 and 1950 welfare and retirement funds. *Id.* In 1963, Eastern decided to spin-off its coal operations to a subsidiary, Eastern Associated Coal Corp. ("EACC"). *Id.* The spin-off was completed by 1965, but Eastern retained its stock interest in EACC through a subsidiary corporation, Coal Properties Corp. ("CPC") until 1987, and it received dividends of more than $100 million from EACC during that period. *Id.*

After 1965, Eastern ceased coal mining operations and was not a signatory to the 1974 NBCWA, (which, as noted, was the first wage agreement to suggest an industry-wide commitment to funding lifetime health benefits to miners and their dependents), or to any subsequent NBCWAs. *Id.* at 530. EACC signed the 1974 NBCWA as well as subsequent ones. However, in 1987, Eastern sold its interest in CPC to Peabody Holding Co., Inc. *Id.* at 516. As a consequence of that sale to that unrelated, third party, Eastern had divested itself of all of its interests in its EACC subsidiary five years before the enactment of the Coal Act.

After the enactment of the Coal Act, the Commissioner assigned Eastern the obligation for Combined Fund premiums for over 1,000 retired miners who had worked for Eastern before 1966, based on Eastern's status as the pre-1978 signatory operator for whom the miners had worked the longest as prescribed by § 9706(a)(3). *Id.* at 517. Eastern was not assigned responsibility for any miners who had been employed by EACC. *Id.* at 530.

From this recitation of the facts in *Eastern*, it is obvious that the Companies are not in a "substantially identical position to Eastern." Eastern was assigned premium liability under the Coal Act solely because it employed the assigned miners. Inasmuch as Eastern never signed a wage agreement committing to lifetime health benefits, it could not be charged with the cost of furnishing those benefits. *See Id.* at 531 ("The company's obligations under the Act depend solely on its roster of employees some 30 to 50 years before the statute's enactment, without any regard to responsibilities that Eastern accepted under any benefit plan the company itself adopted."). *Eastern* did not involve liability under the Coal Act's "related person" provisions. In contrast, the Companies' liability here arises from their relationship to "related person" subsidiaries that signed a NBCWA in 1974 or thereafter. The Commissioner concluded that the nexus between the Companies and those related parties was sufficient to assign liability for miners' lifetime benefits even though none of the Companies signed a wage agreement obligating them to do so.

The Companies attempt to find shelter under the umbrella of *Eastern Enterprises* by stressing that Eastern also had a subsidiary, EACC, that signed a post-1974 NBCWA, and arguing that Eastern's relationship with EACC was not sufficient to sustain the Commissioner's assignments of Coal Act liability to Eastern. Companies' Br. at 15-16. However, that argument ignores a critical distinction. Eastern divested

itself of EACC in 1987, five years before the enactment of the Coal Act. The Coal Act provides that where ostensibly related companies remain in business, the question of whether they are "related persons" within the meaning of the statute is determined with respect to their relationship as of a date shortly before the Act's enactment—July 20, 1992. 26 U.S.C. § 9701(c)(2)(B). Because Eastern sold EACC before that date, EACC was not a "related person" to Eastern under the Act. Therefore, premium liability could not have been imposed on Eastern as a related person to EACC.

We have twice before held that liability based upon the Act's related person provisions removes an assignee from the shelter of *Eastern Enterprises*. In *Unity*, we upheld the constitutionality of the Coal Act as applied to a company that was a related person to both a pre-1974 NBCWA signatory and a post-1974 signatory. At the time the Commissioner made the premium assignments, Unity Real Estate Company was a small corporation closely-held by members of the Jamison family. *Unity owned only a small commercial building and a parking lot. It never mined coal and never signed a coal wage agreement.* Nonetheless, the assignments to it were valid under the Coal Act because it was a related person to several, defunct coal mining companies that ultimately merged into Unity. Among those companies were South Union-PA and South Union-WVA. South Union-PA had mined coal since 1923 and signed NBCWAs from 1947 through 1961. South Union-WVA began mining coal when South Union-PA stopped and it signed the 1974, 1978 and 1981 NBCWAs.[8]

The Commissioner assigned Combined Fund premium liability to Unity for the miners formerly employed by all of Unity's related person entities pursuant to §§ 9706(a)(1) & (2), and Unity challenged the assignment relying on *Eastern*.

[8] A bankruptcy court granted it leave to reject the 1981 NBCWA.

After a comprehensive analysis of the various opinions in *Eastern*, we upheld the Coal Act as applied to Unity and sustained all of the assignments, including assignments of those miners who had worked for South Union-PA. As noted earlier, South Union-PA had not signed a NBCWA in 1974 or thereafter. The critical distinction between Unity/the Jamison family and Eastern Enterprises was that Eastern never signed a 1974 or subsequent NBCWA and was not a related person to any entity that had. Unity, however was tethered to the commitment of lifetime benefits through South Union-WVA, its related person. That coal company had made such a commitment in the 1974, 1978 and 1981 NBCWAs. In affirming Unity's liability we stated:

> [b]ecause the plaintiffs signed NBCWAs in 1974 and thereafter, they are factually distinguishable from Eastern Enterprises. Language in the plurality and the concurrence suggesting that expectations fundamentally changed after 1974 support our conclusions.

178 F.3d at 659. That distinction "compell[ed] the conclusion that *Eastern* is not on all fours with the case before us." *Id.*

Similarly, in *Anker* we upheld the Act's application to Anker coal via a related person that was a post-1974 signatory operator. We held that Anker's related person had agreed to the terms of the 1974, 1978, 1981 and 1984 NBCWAs and that "factually distinguish[ed] Anker's situation from that of Eastern Enterprises and compell[ed] a finding that the Act [was] constitutional [as applied to Anker]." 177 F.3d at 172. There, from 1967 until 1982, Consolidation Coal had contracted with King Knob Coal for King Knob to mine coal on Consolidation's property. As part of this arrangement, King Knob agreed that its employees would be UMWA members and that it would be a signatory

to the then current NBCWAs. To achieve that end, King Knob signed "me too" agreements in 1974, 1978, 1981 and 1984.[9]

An affiliate of Anker acquired King Knob in 1975 and the relationship between Consolidation and King Knob continued until Consolidation canceled its contract with King Knob in 1982. In 1994 and 1995, the Commissioner informed Anker that it was a related person to King Knob and assigned premium liability to Anker for King Knob's retired miners. Anker sued alleging that under *Eastern Enterprises* the Commissioner's assignments were unconstitutional as applied to it.

Relying on *Unity*, we upheld the assignment. We concluded that Anker's related person had agreed to be bound by the terms of the post-1974 NBCWA's. Accordingly, Anker's situation "[fell] outside the specific holding of *Eastern Enterprises*." *Id.* at 172.

Here, not to be deterred by the wealth of precedent (seemingly on point) against them, the Companies press on and argue that *Unity* imposes a limitation on related person liability that precludes consideration of the bargaining history of any company other than the assigned miners' actual employer. They argue that because the assignments in *Unity* were made pursuant to §§ 9706(a)(1) and (2), Unity was treated as if it stood in the shoes of the signatory operators who employed the miners and who had signed all of the

[9] A "me too" agreement is an agreement between an employer who is not a member of the BCOA but who agrees with the UMWA to be bound by the terms of the NBCWA. *Anker*, 177 F.3d at 166-7. A "me too" agreement has terms identical to the terms of the respective NBCWA. There is no legal distinction between the NBCWA itself, and the corresponding "me too" agreement insofar as the employer's rights and obligations are concerned. *Id.* at 172 n.4. Thus, the "distinction" between a NBCWA signatory and a "me too" signatory is not a difference for purposes of our Coal Act analysis. *Id.*

NBCWAs through 1978. Therefore, the Companies claim that *Unity* requires that we treat them as if they too stand in the shoes of the signatory operators who employed the assigned miners. Based upon their insistence that they stand in the shoes of the Pre-1974 Signatories who actually employed the assigned miners, the Companies claim that premium liability assignments are unconstitutional as applied under *Eastern Enterprises* because the Pre-1974 Signatories neither committed to paying lifetime benefits, nor contributed to any such expectation on the part of the assigned miners.

However, this argument is based upon a misreading of *Unity*. Unity was not treated as if it stood in the shoes of a signatory operator who signed a post-1974 NBCWA. Unity was treated as a "related person" to pre-1974 signatories and at least one post-1974 signatory and it was assigned liability for miners who had worked for pre-1974 signatories because of that "related person" status. The Companies are in exactly the same position here.

The Companies also argue that because the assignments were made pursuant to 9706(a)(3), the fact that they have related persons who signed 1974 and later NBCWAs is irrelevant because only the bargaining history of the Pre-1974 Signatories can be considered in determining the constitutionality of the assignments. This argument also allows them to again claim to stand in the shoes of Eastern Enterprises. It is based upon a document in the record signed by a man named "Ray Worley." Worley writes:

> The Coal Act does not permit us to impute a related company's signatory status to that of a signatory operator; that is, a pre-1978 signatory cannot be treated as a 1978 (or later) signatory simply because its parent or "sister" company is a 1978 (or later) signatory.

App. at 178. In the Companies' view, the Commissioner and the Combined Fund Trustees have violated this "policy"

because they claim that the Commissioner's and the Combined Fund Trustees' theory that they are liable for the premiums of the miners employed by the Pre-1974 Signatories effectively treats the Pre-1974 Signatories as if they were Post-1974 Signatories. That is, they have imputed the signatory status of the Post-1974 Signatories to the Pre-1974 Signatories. Moreover, the Companies argue this "imputation of signatory status" theory suggests that the assignments originally made were improper. In the Companies' view, all miners who have been assigned under § 9706(a)(3), should have been assigned, or should be reassigned, under either §§ 9706(a)(1) or (2) if the pre-1978 operator who employed them had a related person who signed a 1978 or later NBCWA.

We disagree. In the first place, the Companies have never claimed that the original assignments of the miners employed by the Pre-1974 Signatories were incorrect under the § 9706(a) statutory assignment scheme.[10] Second, we reject the Companies' claim that Worley's memo is an admission by the Commissioner that the signatory status of one related person cannot be imputed to another. Reply Br. at 10. The Companies do not identify Worley's position with the Social Security Administration, they do not claim that Worley was speaking for the Commissioner and they do not tell us the

[10] The Coal Act provides that if an assigned operator believes that beneficiaries have erroneously been assigned to it, the operator can obtain information about the beneficiaries from the Commissioner and seek review of the assignments. 20 C.F.R. § 9706(f); *see also* 20 C.F.R. §§ 422.601-607. The burden is on the assigned operator to make out a *prima facie* case that the assignments were in error. *See* 20 C.F.R. § 422.605. If the Commissioner finds that the assignments were in error, he or she can declare them void and reassign the beneficiaries to the appropriate signatory operator or related person. 26 U.S.C. § 9706(f)(3)(A). If the Commissioner finds that the assignments are not in error, he or she must notify the assigned operator. The Commissioner's determination is final. 26 U.S.C. § 9706(f)(3)(B).

purpose of Worley's memo. Third, and perhaps most importantly, Worley's memo appears to speak to the original assignment of beneficiaries procedures under § 9706(a). It does not appear to have anything to do with the related person provisions of the Act.[11] Accordingly, the Companies' "obligations must stand or fall regardless of how [it] was assigned the beneficiaries." *Unity*, at 655 n.2.

Our rejection of the Companies' attempt to analogize their circumstances to the facts in *Eastern Enterprises* does not end our inquiry. In *Eastern*, the plurality also noted that the Court's prior decisions

> have left open the possibility that legislation might be unconstitutional if it imposes severe retroactive liability on a limited class of parties that could not have anticipated the liability, and the extent of that liability is substantially disproportionate to the parties' experience.

Eastern, at 528-529 (O'Connor, J.). In recognition of that possibility, and the possibility that "*Eastern* embodies principles capable of broader application," we required an additional level of substantive due process analysis to determine if the assignments to the Companies are constitutional as applied in *Unity*.[12] 178 F.3d at 659. That additional level of analysis measures "the extent of the gap between the coal companies' contractual promises to the Funds and the requirements of the Coal Act." *Id.*

[11] As we noted at the outset, the Companies are not challenging the constitutionality of the related person provisions.

[12] While the *Eastern Enterprise* plurality's cautionary note that legislation might be unconstitutional if it is severely retroactive and substantially disproportionate was made in the course of its Taking Clause analysis, the admonition is applicable to a substantive due process analysis because, as the plurality noted, "[o]ur analysis of legislation under the Takings and Due Process Clauses is correlated to some extent." 524 U.S. at 537 (plurality) (citing *Connolly v. Pension Benefit Guaranty Corp.*, 475 U.S. 211, 223 (1986)).

In *Unity*, we stated that the standard of review when a due process violation is alleged "is forgiving; it bars only arbitrary and irrational congressional action." *Id.* In *Unity* we began our analysis with an extensive review of the available evidence. We noted that Congress' findings in enacting the Coal Act that the coal industry had created a reasonable expectation that miners would have lifetime benefits, and that the coal companies were responsible for the deterioration of miners' Benefit Plans, were "reasonable evaluations of the problem." *Id.* at 670.

We next concluded that the Act's retroactivity did not mean that the legislation was irrational or a violation of due process. *Id.* In reaching that conclusion we recognized that "[t]he heart of retroactivity analysis is an evaluation of the extent of the burden imposed by a retroactive law in relation to the burdened parties' prior acts[.]" We held that "[w]here Congress acts reasonably to redress an injury caused or to enforce an expectation created by a party, it can do so retroactively." *Id.* at 670, 671. In *Unity*, the period between the coal company's contractual undertaking to pay for benefits to the date of the passing of the Coal Act was eleven years. *Id.* at 670.[13] Although that period was "quite long," we concluded that it was "not so extensive as to violate Justice Kennedy's standard, although Unity offers a close case." *Id.*[14] Even though we concluded that the time frame was not unreasonably long, we were nonetheless aware of the considerable financial burden that can result from an assignment of liability under the Act.[15]

[13] The Coal Act was passed in 1992 and South Union-WVA, Unity's related person, last signed a NBCWA in 1981.

[14] In *Unity*, we relied on Justice Kennedy's "explication of the relevant due process principles because the plurality did not reach Eastern's due process claim." 178 F.3d at 670 n.13.

[15] Eastern Enterprises' estimated liability was between $50 and $100 million. 524 U.S. at 529. Unity alleged that its estimated Coal Act liabilities were over six times its total assets and that if the assignments were upheld, it would be bankrupted. 178 F.3d at 655. At the time Unity's appeal was before us, Unity's total payments were under $1 million. *Id.* at 671. Significantly, the Companies do not contend that the assignments will force them into bankruptcy. In fact, they have not bothered to supply us with an estimate of their total potential liability.

Finally, we addressed the proportionality issue and found sufficient proportionality to sustain the constitutionality of the Act.[16] That conclusion was, in large part, driven by the underlying conclusion that the burdens imposed under the Act are justified by the industry's past conduct and the reasonable expectations of lifetime benefits it created. We further concluded that the industry's conduct in creating a benefit fund obligated to pay out more monies than the operators were required to provide, and the industry's conduct in creating the problem of underfunding, was exacerbated by coal companies fleeing the coal industry to avoid further contributions to the fund. *Id.* at 673. Essentially, then, we reasoned that the Act was "Congress' attempt to do equity." *Id.* at 672. Accordingly, we concluded that the Coal Act did not violate substantive due process. Congress was, after all, entitled to remedy the problems caused by the companies' conduct. Given the importance of the coal industry, Congress could certainly respond to a benefits funding structure "vulnerable to 'dumping' retirees when companies left the industry." *Id.* at 673. The Coal Act "is targeted to address the

[16] A statute will not violate substantive due process where the burden imposed is "proportional to the harm legitimately addressed by the legislature." *Unity*, at 671. A statute is not unconstitutional "if the liability actually imposed is not out of proportion to the claimant's prior experience with the object of the legislation." *Id.* at 672. "Prior experience can consist of conduct that creates reasonable expectations about the object of the legislation or conduct that creates the problems that impelled the legislature to act." *Id.*

problem of insufficient resources in the benefit funds and ... it puts the burden on those who, in Congress's reasonable judgment, should bear it." *Id.* at 674.

At oral argument, counsel for the Companies stated that the Companies' "related person" Post-1974 Signatories last signed NBCWAs in 1988. That is only four years from the time the Post-1974 Signatories' contractual obligations to the Funds ceased as the effective date of the Act was 1992. That is significantly less time than the eleven years we found acceptable in *Unity*.[17] Accordingly, we reject the Companies' proportionality attack on the Commissioner's assignments.[18]

B. Can the Commissioner Make Original Assignments After October 1, 1993? [19]

The Companies argue in the alternative that, even if the Commissioner's assignments are constitutional, some of the assignments are nevertheless invalid because they were made

[17] We also applied *Unity*'s due process analysis in *Anker* and found no retroactivity problems in the eight years between the time when Anker's "related person," King Knob, last agreed in a "me too" agreement to be bound by an NBCWA and the passage of the Coal Act. *Anker*, 177 F.3d at 173.

[18] After this case was argued, the Supreme Court decided *Barnhart v. Sigmon Coal Co.*, 534 U.S. 438 (2002). The issue for adjudication in *Sigmon* was a question of statutory construction centering on whether the Coal Act permits the Commissioner to assign retired miners to successors in interest of out-of-business signatory operators. It has no bearing on the issues presented here.

[19] The district court rejected the Companies' argument that certain assignments should be voided because they were made after October 1, 1993. The standard of review in cases of statutory construction is plenary. *Pfeiffer v. Marion Center Area School District*, 917 F.2d 779, 781 (3d Cir.1990).

on or after October 1, 1993.[20, 21] This argument is grounded upon 26 U.S.C. § 9706(a) which states that the Commissioner "*shall*, before October 1, 1993, assign each coal industry retiree who is an eligible beneficiary to a signatory operator which (or any related person with respect to which) remains in business . . . ." (emphasis added). The Companies contend that "shall" means "shall." Accordingly, argue the Companies, since Congress explicitly mandated the Commissioner to make all Coal Act assignments by a date certain, any initial assignments made after that October 1, 1993 are invalid.[22]

The Companies' position is supported by *Dixie Fuel Co. v. Commissioner of Social Security*, 171 F.3d 1052 (6th Cir.1999). There, the Court of Appeals for the Sixth Circuit held that the plain language of the statute, the statutory scheme for assigning beneficiaries and the legislative history all demonstrate that "the intent of Congress is clearly expressed in the statute. The October 1, 1993 date is a deadline." *Id.* at 1064.

Nevertheless, we disagree. We are persuaded by the analysis of the Court of Appeals for the Fourth Circuit in *Holland*

[20] The Companies' complaint acknowledges that the assignments to Stelco Coal and Shenango were made before October 1, 1993. App. at 29, 31. Therefore, this portion of our analysis does not apply to either of those entities.

[21] The Supreme Court has granted certiorari in two cases on this same issue. *Peabody Coal Co. v. Massanari*, ___ F.3d ___, 2001 WL 857197 (6th Cir.2001), *cert. granted by Barnhart v. Peabody Coal Co.*, ___ U.S. ___, 122 S.Ct. 918 (2002) (No. 01-705), and *Bellaire Corp. v. Massanari*, ___ F.3d ___, 2001 WL 856962 (6th Cir.2001), *cert. granted by Holland v. Bellaire Corp.*, ___ U.S. ___, 122 S.Ct. 918 (2002) (No. 01-715).

[22] The Companies "do not challenge the Commissioner's authority to reassign miners after September 30, 1993, *i.e.*, to take miners who were assigned incorrectly before September 30, 1993, and correctly reassign them after September 30, 1993 as provided for in Section 9706(f)(3)." Companies Br. at 23 n.4.

v. Pardee Coal Co., 269 F.3d 424 (4th Cir.2001). That is the only other case that has addressed the effect of the October 1, 1993 deadline, and we believe it is better reasoned than *Dixie Fuel*. In *Pardee Coal*, the Commissioner determined that Pardee was a signatory operator and assigned it premium liability for a number of retired miners and their spouses. Because several of the retired miners were assigned to Pardee after October 1, 1993, Pardee denied that it was liable to the Combined Fund for those premiums because they were made after the supposed statutory cut-off date. The district court agreed with Pardee and held that the post-October 1, 1993 assignments were void as a matter of law. However, applying "well-settled principles of statutory construction," the court of appeals examined the text of the Act, the context in which it was enacted, its structure and its legislative history, and found no indication of congressional intent to establish October 1, 1993 as a "jurisdictional deadline, rendering void all beneficiary assignments made by the [Commissioner] after that date." 269 F.3d 437. Our inquiry leads us to the same result.

Admittedly, "shall" is generally mandatory when used in a statute. *See, e.g., United States v. Monsanto*, 491 U.S. 600, 607 (1989) ("Congress could not have chosen stronger words [than 'shall order forfeiture'] to express its intent that forfeiture is mandatory. . . ."). However, a statutory deadline does not, by itself, establish that Congress intended to strip an agency's authority to act after the deadline has passed. In *Brock v. Pierce County*, 476 U.S. 253 (1986), the Court had to decide if Congress intended to prevent the Secretary of Labor from recovering misused funds under the Comprehensive Employment and Training Act ("CETA") after the expiration of a statutory deadline in that Act. The relevant provision of CETA stated that the Secretary "shall" issue a final determination regarding misuse of CETA funds within 120 days after receiving a complaint alleging misuse. *Id.* at 254-55. The Secretary disallowed Pierce County's expenditure of approximately $500,000 of CETA funds after an

investigation disclosed that the funds had not been used appropriately. The county challenged the Secretary's determination in court alleging that the Secretary had no authority because his determination had been made after the 120 day period had expired.

A unanimous Supreme Court disagreed. The Court held that "the mere use of the word 'shall' . . . , standing alone, is not enough to remove the Secretary's power to act after 120 days." *Id.* at 262. The Court was "most reluctant to conclude that every failure of an agency to observe a procedural requirement voids subsequent agency action, especially when important public rights are at stake." *Id.* at 260. Rather, the Court concluded that "the normal indicia of congressional intent" should be used to determine whether an agency has authority to act despite the expiration of a statutory deadline. Therefore, we can not satisfactorily resolve that question by focusing upon a single word in a statute, even when that word appears to be as conclusive of congressional intent as "shall" appears to be. *Id.* at 262 n.9.

We find the Court's reasoning in *United States v. James Daniel Good Real Property*, 510 U.S. 43 (1993), dispositive here. There, the Court addressed, *inter alia*, the issue of whether a civil forfeiture action, filed within the statute of limitations, but without complying with other statutory timing directives, must be dismissed. In finding that the timing did not compel dismissal so long as the action was filed within the statute of limitations, the Court noted that "many statutory requisitions intended for the guide of officers in the conduct of business devolved upon them . . . do not limit their power or render its exercise in disregard of the requisitions ineffectual." *Id.* at 63 (quoting *French v. Edwards*, 80 U.S. (13 Wall.) 506, 511 (1872)). Consequently, "*if a statute does not specify a consequence for noncompliance with statutory timing provisions*, the federal courts will not in the ordinary

course impose their own coercive sanction." 510 U.S. at 63 (citations omitted) (emphasis added). No such consequence is included in the Coal Act.

Moreover, we addressed this issue of statutory interpretation in *Southwestern Pennsylvania Growth Alliance v. Browner*, 121 F.3d 106, 113-115 (3d Cir.1997). We were there concerned with whether the Environmental Protection Agency's failure to act on a Clean Air petition within the statutory time frame deprived the agency of authority to take action on the petition. Relying heavily on *Brock v. Pierce County*, we held that a statute stating that an agency "shall" complete action by a certain time does not divest the agency of jurisdiction to act unless there is some additional indication in the statute of a congressional intent to bar further agency action.

Our review of the Coal Act discloses no further indication of congressional intent to deprive the Commissioner of the authority to make original assignments after October 1, 1993. Congress' failure to specify any consequences if the Secretary does not make assignments by the purported drop dead date is quite telling.[23] Moreover, *Brock v. Pierce County* was decided six years before Congress passed the Coal Act. Accordingly, we must presume that Congress knew that its instruction that the Commissioner "shall" make assignments before October 1, 1993, would not by itself divest the Commissioner of jurisdiction to act after that date. *See United States v. Wells*, 519 U.S. 482, 485 (1997) ("[W]e presume that Congress expects its statutes to be read in conformity with this Court's precedents[.]"). Congress would have specified consequences for failing to assign by a drop dead date or explicitly stated that the Secretary's authority to

[23] *See In re TWA*, 96 F.3d 687, 690 (3d Cir.1996), referring to a statutory time bar in the Bankruptcy Code as a "drop dead date."

assign terminated after that date if Congress had intended to abruptly end the Secretary's authority to make original assignments after October 1, 1993.

Congress has been this explicit in a number of other statutes. *See, e.g.*, 42 U.S.C. § 1396n(h) (application for waiver of Medicaid requirements must be deemed approved if Secretary of Health and Human Services does not issue a decision within 90 days); 49 U.S.C. § 15910(c) (providing that Surface Transportation Board investigative proceeding is dismissed automatically if not concluded within three years).

The Companies argue that the Act does provide a consequence for not assigning a miner before October 1, 1993 because after that date the miner becomes an "unassigned miner" and is placed in the orphan retiree pool. However, that is not enough to conclude that the Secretary no longer has authority to assign after October 1, 1993. It is simply a safety net insuring that miners who are not assigned will not thereby be denied the benefits they are entitled to. We see no language in the Act, and the Companies direct us to none, that would forge a link between unassigned status and the Commissioner's failure to complete the assignment process by October 1, 1993.

In addition, the Act's administrative review provisions suggest that Congress did not intend to limit the Commissioner's authority to make assignments after October 1, 1993. The Coal Act gives coal companies the right to an administrative review of an assignment decision and further provides that if the Commissioner concludes that an initial decision was erroneous, the Commissioner must review the beneficiary's record and reassign the miner accordingly. 26 U.S.C. § 9706(f)(3). Although a coal operator's request for a review must be submitted to the Commissioner within a specified time frame, the Act does not impose any time

limitations on the Commissioner's review process.[24] This strongly suggests that Congress expected that beneficiary reassignments would be made after October 1, 1993. However, if October 1, 1993 is the drop dead date the Companies claim, the Commissioner would have no authority to make a new assignment even though the initial assignment resulted from factual error, a misreading of the statute, or administrative misfeasance. Although it can be argued that the October 1, 1993 cutoff only applies to original assignments, not those made as a result of the administrative review process, nothing in the text of the Act allows us to draw such a distinction.

In addition, we can infer no congressional intent to bar agency action after October 1, 1993, from the purpose and structure of the Coal Act. As we noted earlier, the Coal Act was enacted in 1992 "to ensure that retired coal miners and their dependents would continue to receive the health and death benefits they had been receiving since the 1940s pursuant to a series of collective bargaining agreements." *Anker*, at 163-64. The Act was bottomed on Congress' explicit finding that

> in order to secure the stability of interstate commerce, it is necessary to modify the current private health care benefit plan structure for retirees in the coal industry *to identify persons most responsible for plan liabilities* in order to stabilize plan funding and allow for the provision of health care benefits to such retirees.

26 U.S.C. § 9701 note (emphasis added). Congress was attempting to "insure that every reasonable effort is made to

[24] An assigned operator may, within 30 days of receiving notice with respect to a particular beneficiary, request information as to his work history. *See* 26 U.S.C. § 9706(f)(1). After receiving the information, the assigned operator has an additional 30 days in which to request review of the assignment. *See* 26 U.S.C. § 9706(f)(2).

locate a responsible party to provide the benefits before the costs are passed to other signatory companies which have never had any connection to the individual[.]" 138 Cong. Rec. S17604 (daily ed. Oct. 8, 1992). Thus, the Conference Committee Report declared that the Act's "overriding purpose is to find and designate a specific obligor for as many beneficiaries in the [Benefit] Plans as possible." *Id.* The conferees further stated their "inten[tion] that the largest possible number of beneficiaries in the [Benefit] Plans be assigned to a specific or designated company[,]" and "that the number of unassigned beneficiaries is kept to an absclute minimum." *Id.* at S17605.

In short, the Coal Act's key objective is to ensure that the costs of providing retirement benefits will, so far as possible, be borne by the private parties most responsible for creating retired miners' expectations of lifetime health benefits. Consequently, the Act broadly imposes liability on original signatories and a broad class of related business entities. Cutting off the Commissioner's authority to make assignments after October 1, 1993, would surely frustrate that objective. If the Commissioner cannot make assignments beyond that date, otherwise assignable beneficiaries would be retained in the orphan retiree pool and benefits would paid from federal funds. 30 U.S.C. § 1232(h) and 26 U.S.C. § 9705(b). Moreover, if those transfers are inadequate, orphan retiree costs will be imposed on other private parties through the imposition of the unassigned beneficiary premium. *See* 26 U.S.C. § 9704(d).[25] Those other private parties would have no substantive connection or nexus to the unassigned beneficiary, and would certainly not be responsible for creating any expectation of lifetime benefits.

[25] The government submits that these costs could amount to millions of dollars in additional liability. According to the government, nearly 10,000 beneficiary assignments were made after October 1, 1993. Government's Br. at 48.

Thus, reading "shall" to invalidate post-October 1, 1993 assignments would eviscerate a program intended to impose funding burdens on the most responsible parties and shift funding burdens to the government or to other companies with no connection to the beneficiaries assigned to those companies. We are thus reminded of the situation in *Brock v. Pierce County*, where the Court was reluctant to find that a statutory deadline barred agency action because "public rights [were] at stake" and the "public fisc" was implicated. 476 U.S. at 260, 262. Such a result here would also result in a financial windfall to some operators at the expense of those operators whose assignments were completed before October 1, 1993 because the former would be relieved of paying for miners' expectations that they or their related entities helped create.

Finally, putting aside the intricacies of statutory interpretation and legislative history, we reach the same result by employing that all too often overlooked tool: practical common sense. Interpreting the October 1, 1993 date as a cutoff results in a time frame that would make the action Congress required of the Commissioner impossible. It would thereby frustrate the very congressional purpose the Act sought to further. The Coal Act became law in October of 1992. The Commissioner therefore had to review the records of, and assign premium responsibility for, roughly 65,000 miners by October 1, 1993. *Holland v. Pardee Coal Co.*, 269 F.3d at 432 n.9. "To assign those miners, the agency had to search each miner's records, and reconstruct his employment history, and then match that history against the lists of signatory coal operators." *Id.* This Gordian knot was significantly tightened by Congress' failure to appropriate funds until July 2, 1993—less than 80 days before the statutory date of October 1, 1993. It would therefore have been as close to impossible as any administrative task can get for the Commissioner to complete the 65,000 by October 1, 1993. Accordingly, we cannot agree that the Commissioner

was powerless to make original assignments after October 1, 1993.[26] Thus, as the Court stated in *Regions Hosp. v. Shalala*, 522 U.S. 448, 459 n.3 (1998), "The Secretary's failure to meet the deadline, a not uncommon occurrence when heavy loads are thrust on administrators, does not mean that the official lacked power to act beyond it."

VI.

---

[26] The House Committee on Ways and Means, in a Committee Print issued on September 3, 1993, only four weeks before the effective date of the Coal Act reinforces this point. The Committee Print reads:

> SSA anticipated that checking the [employment] records would be very-time consuming. Most beneficiaries are associated with the 1950 Benefit Fund, and therefore with miners who retired before 1976. Social Security records are not computerized for work history prior to 1978. Linking an individual's work history to a specific employer will thus require searching through microfilm records and entering the information by hand into the computer system. *Preliminary estimates by the SSA suggest that it would take approximately 150 work years just to retrieve the microfilm records. This does not include the additional work involved in determining the assignment to an employer. On a routine basis, SSA has 140 technicians specially trained to work with the microfilm records, which are difficult to decipher. Extra resources would be needed to complete the assignments by the October 1, 1993 target date.*

Financing UMWA Coal Miner "Orphan Retiree" Health Benefits, House Committee of Ways and Means (Sept. 3, 1993), at 64-65 (emphasis added). However, Congress did not appropriate any "extra resources" to the Commissioner between September 3, 1993 and October 1, 1993. Therefore, Congress could not possibly have intended that the Commissioner would complete the entire assignment process by October 1, 1993.

Accordingly, for all of the above reasons, we will affirm the judgment of the district court.[27]

A True Copy:
Teste:

Clerk of the United States Court of Appeals for the Third Circuit.

---

[27] Because we have found that the Coal Act is constitutional as applied to the Companies, we need not address the Companies' argument that the Commissioner's refusal to revoke their assignments in the wake of Eastern Enterprises was arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law in violation of the Administrative Procedure Act, 5 U.S.C. § 705(2)(A). In addition, because we have found that the Commissioner has the authority to make original assignments after October 1, 1993, we need not address the Companies' argument that they are entitled to a refund of premiums they are paid.

JUN 7 2002

Nos. 01-705 and 01-715

IN THE

Supreme Court of the United States

JO ANNE B. BARNHART,
COMMISSIONER OF SOCIAL SECURITY
Petitioner,

v.

PEABODY COAL COMPANY, *et al.*,
Respondents.

MICHAEL H. HOLLAND, *et al.*, as Trustees of the United Mine Workers of America Combined Benefit Fund,
Petitioners,

v.

BELLAIRE CORPORATION, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF OF *AMICUS CURIAE* ELGIN NATIONAL INDUSTRIES, INC., IN SUPPORT OF RESPONDENTS

Mary Lou Smith
Counsel of Record
HOWE, ANDERSON & STEYER, P.C.
Suite 620, 815 Connecticut Avenue, N.W.
Washington D.C. 20006
(202) 296-5680

Balmar Legal Publishing Services, Falls Church, VA, 703-289-9000

BEST AVAILABLE COPY

TABLE OF CONTENTS

Page No.

TABLE OF AUTHORITIES ii

STATEMENT OF THE CASE 1

A. THE GOVERNMENT'S ASSIGNMENTS 2

1. THE INITIAL ROUND OF ASSIGNMENTS 3

2. THE POST-1993 ASSIGNMENTS 3

3. ELGIN'S DISPUTE WITH THE COMBINED FUND 4

B. THE LEGISLATIVE SETTING FOR ENACTMENT OF THE COAL ACT 4

C. THE COMBINED FUND'S TIMETABLE 6

D. CONGRESSIONAL OVERSIGHT 7

SUMMARY OF ARGUMENT 9

ARGUMENT 9

I. THE LANGUAGE OF THE COAL ACT IS CLEAR, UNAMBIGUOUS, AND CONSISTENT WITH CONGRESSIONAL INTENT THAT ASSIGNMENTS BE MADE BEFORE OCTOBER 1, 1993 OR NOT AT ALL 9

II. THE GOVERNMENT'S UNANNOUNCED RETURN TO THE ASSIGNMENT TASK IN 1995 WAS IMPROPER 10

III. THERE IS NO OVERRIDING PUBLIC INTEREST WHICH JUSTIFIES IGNORING THE OCTOBER 1, 1993 DEADLINE 11

CONCLUSION 12

TABLE OF AUTHORITIES

CASES **Page(s)**

Association of Bituminous Contractors, Inc. v. Apfel, 156 F.3d 1246 (D.C. Cir. 1998).....2

Barnhart v. Sigmon Coal Co., Inc., 122 S.Ct. 941 (2002).....7, 12

Burlington Truck Lines v. United States, 371 U.S. 156 (1962).....18

Dixie Fuel Co. v. Callahan, 136 F.Supp.2d 659 (E.D.Ky. 2001).....4

Eastern Enterprises v. Apfel, 524 U.S. 498 (1998) 4, 7

Elgin National Industries, Inc. v. Barnhart, 01-0397 (D.D.C).....1

Holland v. Elgin National Industries, Inc., et al., No. 00-2040 (D.D.C.).....1

Investment Co. Institute v. Camp, 401 U.S. 617 (1971).....18

Super Tire Eng'g Co. v. McCorkle, 416 U.S. 115 (1974) 14

STATUTES AND LEGISLATIVE MATERIALS

"Coal Industry Health Benefit Stabilization Act of 1989," S.1708, 101st Cong., 1st Sess.....7

"Coal Industry Retiree Health Benefit Act of 1991," S.1989, 102nd Cong., 1st Sess.....7

Coal Industry Retiree Health Benefit Act of 1992 .....*passim*

26 U.S.C. § 9701(c)(2).....2

26 U.S.C. § 9702(a)(1).....8

26 U.S.C. § 9702(a)(2).....8

26 U.S.C. § 9703.....11

26 U.S.C. § 9703(f)(1).....4

26 U.S.C. § 9704(a).....2, 10

26 U.S.C. § 9704(f).....15

26 U.S.C. § 9704(g)(1).....10

26 U.S.C. § 9704(i)(A).....10

26 U.S.C. § 9704(i)(D).....10

26 U.S.C. § 9705(a)(1)(A).....8

26 U.S.C. § 9705(a)(1)(B).....10

26 U.S.C. § 9705(a)(1)(C).....10

26 U.S.C. § 9705(a)(2).....8

26 U.S.C. § 9706(a).....10

26 U.S.C. § 9706(a) (1992).....2

26 U.S.C. § 9706(c).....8

26 U.S.C. § 9706(e)(2).....3

26 U.S.C. § 9706(f)(1).....3

26 U.S.C. § 9706(f)(2).....3

26 U.S.C. § 9706(f)(5).....4

20 C.F.R. Subpart G, § 725.490, et seq.....8

135 Cong. Rec. S12312 (October 2, 1989).....7

137 Cong. Rec. S17061 (Nov. 19, 1991) 7

138 Cong. Rec. S17,605 (daily ed. Oct. 8, 1992).....15, 18

138 Cong. Rec. S3433 (March 12, 1992).....7

MISCELLANEOUS

Coal Industry Retiree Health Benefit Act of 1992: Hearing Before the Subcomm. on Oversight of the House Ways and Means Comm., 104th Cong. 23 (1995).....12

Hendrickson, An Examination of Administrative Issues Under the Coal Industry Retiree Health Benefit Act of 1992 in the Context of Judicial Review: Overton Park, Private Rights and Limits on Informal Agency Authority, 22 Energy & Min. L. Inst., ch 10 (2002) 17

Joint Committee on Taxation, Description of the Chairman's Mark of the "Retired Coal Miners Health Benefit Security Act" (JCX-90-00), Sep. 5, 2000 13

Lopatto, The Federal Black Lung Program: A 1983 Primer, 85 W.VA L.Rev. 677 (1983) 19

Provisions Relating to the Health Benefits of Retired Coal Miners: Hearing before the Committee on Ways and Means House of Representatives, 103d Cong. 23 (1993)..... 11

Retired Coal Miners' Health Benefit Funds: Financial Challenges Continue, GAO-02-243 (April 2002) 13

Social Security: Increasing Number of Disability Claims and Deteriorating Service, GAO/HRD-94-11 (1993)..... 19

INTEREST OF *AMICUS CURIAE* ELGIN NATIONAL INDUSTRIES, INC.

This brief *amicus curiae* is filed in support of the Respondents, Peabody Coal Company, *et al.*, and Bellaire Corporation, *et al.*[1] Elgin National Industries, Inc., is a party to pending litigation which concerns the same issue arising under the Coal Industry Retiree Health Benefit Act of 1992 ("Coal Act"). *Holland v. Elgin National Industries, Inc., et al.*, No. 00-2040; *Elgin National Industries, Inc. v. Barnhart*, 01-0397 (D.D.C). Because the district court proceedings have been stayed pending the resolution of the issue by the Court, Elgin has a direct interest in the outcome of the case now before the Court.

Elgin National Industries, Inc., a closely-held Delaware corporation, came into existence in 1969 as a result of a merger between TST Industries, Inc., a Delaware corporation, and Elgin National Watch Company, a Delaware corporation. Elgin subsequently became the parent corporation of subsidiary corporations engaged, in part, in the construction of facilities which sized, washed, dried and handled coal. This included J.O. Lively, Inc., a West Virginia corporation, Langley & Morgan Corporation, a Kentucky corporation, and Roberts & Schaefer Company, a Delaware corporation.

Elgin itself has never engaged in coal mining or coal mine construction and has never been a party to a collective bargaining agreement with the United Mine Workers of America ("UMWA"), a labor organization representing a segment of the mining industry. Elgin's only connection to the UMWA-represented segment of the mining industry is through the activities of its subsidiaries. Over the years, J.O. Lively, Langley & Morgan and Roberts & Schaefer engaged

---

[1] This brief is filed concurrently with the written consents of the parties. No counsel for a party authored this brief in whole or in part, and no person other than the *amicus curiae* has made a monetary contribution to the preparation and submission of this brief.

in construction work on coal mine property subject to collective bargaining agreements negotiated by the UMWA and the Association of Bituminous Contractors, Inc.[2] J.O. Lively, Langley & Morgan and Roberts & Schaefer are "related persons" to Elgin within the meaning of the Coal Act. 26 U.S.C. § 9701(c)(2). Because of this "related person" relationship, Elgin is liable for any Coal Act premium assessments against its construction company subsidiaries. 26 U.S.C. § 9704(a).

STATEMENT OF THE CASE

As part of the comprehensive system for providing health benefits to retirees established in the Coal Act, Congress charged the Secretary of Health and Human Services with assigning each eligible beneficiary of the Combined Fund to a signatory operator or its related persons "before October 1, 1993." 26 U.S.C. § 9706(a) (1992). The Secretary of Health and Human Services delegated this task to the Commissioner of Social Security, and, subsequently, Congress reorganized Social Security such that the duties of the Secretary of Health and Human Services officially rested with the Commissioner. The issue before the Court is whether the government could permissibly assign beneficiaries after the specified October 1, 1993 date, or whether such assignments are void.

As discussed more fully below, the government assigned a small number of beneficiaries (retirees and their dependents) in 1993, but did not make the bulk of the assignments to Elgin and to "related persons" to Elgin within the meaning of the Coal Act until much later. The Coal Act assignment and review processes are not the subject of formal administrative procedures, and Elgin cannot provide a full accounting of the government actions which culminated in these assignments.

---

[2] ABC's history of collective bargaining with the UMWA and its experience under the Coal Act is recounted in *Association of Bituminous Contractors, Inc. v. Apfel*, 156 F.3d 1246 (D.C. Cir. 1998).

Nonetheless, Elgin believes that most of the 1995 through 1999 assignments were initially made after the October 1, 1993 date specified in Coal Act Section 9706(a).

A. The government's assignments

The assignment process commences with the government sending a letter to an "assigned operator" notifying it of its designation. 26 U.S.C. § 9706(e)(2). The Coal Act includes a process for requesting review of assignments, the first step in which allows an assigned operator to request "detailed information as to the work history of the beneficiary and the basis of the assignment." 26 U.S.C. § 9706(f)(1). It is anticipated that the government will provide this information, and the operator is then given the opportunity to request review of the assignment. 26 U.S.C. § 9706(f)(2). The government then decides whether to affirm or overturn the assignment without any further hearing or notice to the affected operator as to how it intends to proceed.

In Elgin's experience, when an assigned company requested the "detailed information as to the work history of the beneficiary and the basis for the assignment" as anticipated by Section 9706(f)(1), what it got was a print-out of the retiree's SSA earnings records and a statement by SSA referencing one of the three Coal Act assignment categories. In many cases, this information does not answer the question of why an assignment was made to one employer in favor of another. The government's initial correspondence does not address the basis for excluding other employers in favor of one of the chosen company, and the designated "assigned operator" is left to speculate as to whether there is another employer who fits the assignment criteria.

Short of litigation, the only available means of obtaining the information behind the government's decision is by way of a Freedom of Information Act ("FOIA") request. In response to such a request, the government's FOIA officer may produce documents which clarify the basis for the assignment, but there is no guarantee that useful information

will be forthcoming. There is also no guarantee of a prompt response to a FOIA request. As highlighted in proceedings before the district court in *Dixie Fuel Co. v. Callahan*, 136 F.Supp.2d 659 (E.D.Ky. 2001), disputes with the government under FOIA itself were not unheard of.

The Coal Act requires that an "assigned operator" pay for all assigned beneficiaries while the review process is conducted. 26 U.S.C. § 9706(f)(5). The Combined Fund, which is charged with collecting premiums from assigned operators, has historically sent out yearly memoranda in October of the new plan year advising operators of their obligations. The Combined Fund bills the company for all existing assignments as of the date of the yearly memoranda, taking into account any changes from the prior year. This is the only time that adjustments are made to the assigned operator's premium payments. The Coal Act contains no specific refund provision, and the "assigned operator" is left to bear the cost of erroneous assignments while the government considers whether to rescind them.

1. The initial round of assignments

The retirees who are the subject of the government's assignments had to have had sufficient coal mining employment to qualify for a UMWA pension. Inasmuch as the Coal Act's assignment criteria rests on most recent or longest employment history, Elgin did not expect that a large number of these beneficiaries would end up with a construction company employer under the Coal Act's assignment hierarchy.[3] Nonetheless, accepting the possibility that a few of these would be assigned to J.O. Lively, Langley & Morgan and Roberts & Schaefer, Elgin was not surprised

---

[3] Combined Fund retiree-beneficiaries were formerly receiving benefits from the predecessor UMWA Health & Retirement Funds that were merged into the Combined Fund. 26 U.S.C. § 9703(f)(1). As discussed in *Ass'n of Bituminous Contractors*, *supra*, construction company retirees are provided benefits separate and apart from the UMWA Health & Retirement Funds.

when, in 1993, the companies received letters from the government notifying each of the assignment of former employees under the Coal Act.

In response to the government's notices, the companies reviewed the employment histories of the individuals in question and questioned those which it did not believe fell within the assignment criteria of the Coal Act. Ultimately, at the conclusion of the government's review process, J.O. Lively was left with one former employee; Langley & Morgan was left with six former employees; and Roberts & Schaefer was left with two former employees. Elgin paid the required Combined Fund premiums for these beneficiaries.

2. The post-1993 assignments

What Elgin did not anticipate was that it would subsequently be targeted by the government for additional assignments. Beginning in 1995, and continuing through 1996 and 1997, and again in 1999, the government sent out new assignments to J.O. Lively, Langley & Morgan and Roberts & Schaefer. Based on the timing of these assignments, Elgin proceeded on the assumption that these must be reassignments following an initial assignee's challenge to its designation. Elgin therefore specifically asked the government about each beneficiary's assignment history. The government treated this as a FOIA request and referred the request to a separate part of SSA, the FOIA officer.

Eventually Elgin learned that the companies were receiving assignments for beneficiaries not previously assigned. The number of these post-1993 assignments was far larger than the initial group of assigned beneficiaries. At that point, it became apparent that the companies were not being assigned some small number of construction workers whose employment history met the statutory most recent/longest employment criteria. It was particularly striking that a number of the retirees were apparently being assigned on the basis of extraordinarily brief periods of construction employment dating from the 1950's which had been followed

by lengthy, "real" coal mine work. The government had apparently devised a new theory for liability which had not previously been used.

3. Elgin's dispute with the Combined Fund

After the initial round of assignments, Elgin had paid the requested amounts each year, notwithstanding its challenges to the newly made assignments. By 1998, Elgin had paid in excess of $400,000 and the Combined Fund's calculation of the aggregate amount due from the companies was in an "overpayment" posture. That is, after adjustments for changes in the beneficiary population, Elgin had paid more on behalf of the three companies than was due for prior years. Upon review of the 1998 Combined Fund memoranda for the companies, Elgin believed that the Combined Fund's calculation of the amounts due would yield an ever increasing overpayment because erroneous assignments were still included. For example, the Combined Fund still included an assignment previously been overturned by SSA and other assignments where the UMWA Health and Retirement Funds had affirmatively documented the absence of covered employment by the assigned company. The Combined Fund also included assignments made by SSA under the third-tier of Coal Act Section 9706 which was held unconstitutional in *Eastern Enterprises*.

Elgin attempted to straighten this out informally with the Combined Fund since the amounts at issue were significant, at least to Elgin. While a Combined Fund official indicated in December 1998 that he would contact SSA about the assignment which had been overturned, nothing further was heard from the Combined Fund before October 1999. At that point, the new plan year memoranda still included all of the challenged assignments. It also included a new set of assignments which had been made by SSA in September 1999.

In August 2000, litigation ensued over the propriety of the assignments and the Combined Fund's claim for

additional premium payments. Elgin sued the government to overturn assignments, and the Combined Fund sued Elgin for payment of premiums.

B. The legislative setting for enactment of the Coal Act.

The Court has previously detailed the history of the coal industry's attempt to establish, through collective bargaining, an adequate system of health and retirement benefits for coal miners and the resulting labor unrest and financial instability which led to passage of the Coal Act. *Eastern Enterprises v. Apfel*, 524 U.S. 498, 504-514 (1998) and *Barnhart v. Sigmon Coal Co., Inc.*, 122 S.Ct. 941 (2002). The Coal Act, signed into law on October 24, 1992, is a comprehensive legislative program which reconfigured the system for providing private health care benefits to retirees in the coal industry. By restructuring this system, Congress intended to solve the historical funding problems of the then-existing UMWA Benefit Plans once and for all.

The version of the "Coal Industry Retiree Health Benefit Act of 1992" which eventually became law was introduced by Senator Rockefeller on July 29, 1992. It was significantly unlike its similarly named predecessors in several respects.[4] It did not include any type of direct tax on coal production or hours worked in the industry. Rather, it incorporated features from the competing proposals which had anticipated transfers of funds from the Abandoned Mine Lands Trust Fund and from the UMWA 1950 Pension Fund. Most significantly, it contained a wholly new funding feature which had not

---

[4] The first legislative solution, proposed in 1989, was entitled the "Coal Industry Health Benefit Stabilization Act of 1989." S.1708, 101st Cong., 1st Sess. *See* 135 Cong. Rec. S12312 (October 2, 1989). In November 1991, a new legislative proposal was introduced, entitled the "Coal Industry Retiree Health Benefit Act of 1991." S.1989, 102nd Cong., 1st Sess. *See* 137 Cong.Rec. S17061 (Nov. 19, 1991). In March of 1992, a revised version of the bill was given the updated title, "Coal Industry Retiree Health Benefit Act of 1992." *See* 138 Cong. Rec. S3433 (March 12, 1992).

previously appeared in any of the legislative proposals dating from 1989, 1991, or earlier in 1992, namely, the creation of a private body, the Combined Benefit Fund, which would be run by private individuals but whose beneficiaries would be assigned to former employers by a governmental body.

The version of the legislation under consideration in July 1992 was the first instance which included a proposal for the government to play any role in the assessment of liability against former employers. None of the prior proposals had anticipated the government generally, or the Social Security Administration in particular, taking an active part in identifying liable parties or otherwise administering a program of retiree benefits for UMWA retirees and their dependents.

As mentioned earlier, the Coal Act originally assigned the governmental duties to the Secretary of the Department of Health and Human Services. Given the backdrop of the federal black lung program upon which the Coal Act was created, Elgin believes it is significant that the Department of Labor was not chosen to carry out this function. The Social Security Administration had, early on, played a role in administering the federal black lung program, but those duties were transferred to the Secretary of Labor in the 1970's. In particular, the Labor Department was the body which undertook the task of matching employees with former employers, who are so-called "responsible operators" under the regulatory scheme promulgated to implement the Black Lung Benefits Act. 20 C.F.R. Subpart G, § 725.490, *et seq.* Since the Department of Labor's role in carrying out the Black Lung Act's assignment of responsibility to former employers was well known to Congress, the decision not to use the Labor Department indicates that Congress did not anticipate a similar or comparable regulatory program under the Coal Act.

C. The Combined Fund's timetable

Congress set up a precise timetable for creation and funding of the Combined Fund so that retiree health care coverage would be maintained during the transition period, so that the transition would proceed in an orderly manner, and so that, ultimately, the Combined Fund would be a stable entity. Congress devised the following plan:

-- Enactment date:

Trustees of the 1950 UMWA Pension Plan "shall segregate" $210 million from the assets of the plan for anticipated disbursement to the Combined Fund. 26 U.S.C. § 9705(a)(2).

-- October 1, 1992 (or the twentieth day after enactment, if later):

UMWA Benefit plans "shall ... provide" a list of eligible beneficiaries to the government, and "shall provide" the names of all assigned operators (and any related person) for each beneficiary. 26 U.S.C. § 9706(c).

-- As soon as practicable (but not later than 60 days after enactment):

Persons charged with the duty of appointing trustees of the Combined Fund "shall designate the individuals to serve as trustees." 26 U.S.C. § 9702(a)(1).

-- February 1, 1993:

Settlors of the UMWA Benefit Plans "shall cause such plans to be merged into the Combined Fund." 26 U.S.C. § 9702(a)(2).

Trustees of the 1950 UMWA Pension Plan "shall transfer" $70 million to the Combined Fund. 26 U.S.C. § 9705(a)(1)(A).

Combined Fund's first plan year begins, with benefits and costs to be funded initially by 1988 agreement operators. 26 U.S.C. § 9704(i)(A).

-- October 1, 1993:

Before this date, the government "shall ... assign" each beneficiary to a signatory operator (or any related person) according to the specified criteria. 26 U.S.C. § 9706(a).

Trustees of the 1950 UMWA Pension Plan "shall transfer" $70 million to the Combined Fund. 26 U.S.C. § 9705(a)(1)(B).

Combined Fund's first full plan year begins. 26 U.S.C. § 9704(g)(1).

-- October 1, 1994:

Trustees of the 1950 UMWA Pension Plan "shall transfer" $70 million to the Combined Fund. 26 U.S.C. § 9705(a)(1)(C).

Combined Fund's second full plan year begins. 26 U.S.C. § 9704(g)(1).

Congress provided that the private parties assigned beneficiaries by the government would be liable for premium payments to the Combined Fund which covered the period back to the beginning of the first plan, i.e. February 1, 1993, and which were calculated for each new plan year beginning October 1st. 26 U.S.C. § 9704(a). Congress fully understood, however, that the identity of the assigned operators would not be known as of February 1, 1993. Congress therefore provided for the first, short, plan year costs to be borne by 1988 agreement operators, who would then have their premium payments adjusted after the assignment process was complete. 26 U.S.C. § 9704(i)(D).

Congress also understood that not all retirees could be paired with a former employer or "related person" to a former employer, Congress made specific provisions for so-called

"unassigned" beneficiaries. The statutory funding arrangement assures uniform benefits for all eligible Combined Fund beneficiaries. 26 U.S.C. § 9703. There is no distinction drawn between those who could be paired with a former employer or "related person" and those who remain in the unassigned category.

D. Congressional oversight

Since the passage of the Coal Act in 1992, there has been no change in the general funding framework and timetable described above. Congress has, however, continued to monitor the status of its statutory plan to ensure medical benefit coverage for retired miners and their dependents. This includes monitoring both the performance of SSA and the Combined Fund's financial situation.

On September 9, 1993, approximately eleven months after passage of the Coal Act, the U.S. House Ways and Means Committee convened a hearing on the Coal Act. Acting SSA Commissioner Lawrence H. Thompson testified at that time that SSA "fully expect[ed] to meet the statutory due date for carrying out [SSA's] assigned tasks under the Act." *Provisions Relating to the Health Benefits of Retired Coal Miners: Hearing before the Committee on Ways and Means House of Representatives*, 103d Cong. 23 (1993). The three tasks which Mr. Thompson described were calculating the amount of the health benefit premium for each beneficiary; assigning each beneficiary to the coal operator who would be liable for premium payments; and considering requests for review of assignments. Mr. Thompson testified that SSA had received a list of approximately 80,000 miners to be assigned, but that certain large coal operators voluntarily acknowledged premium responsibility for 15,000 of those. Thus, the assignment task undertaken by SSA involved placement of a total of 65,000 miners.

Without hesitation or qualification, Mr. Thompson advised the committee that SSA fully expected to "complete the assignment process by October 1, 1993." *Id.* at 26. He

stressed that SSA was "working hard to fulfill its responsibilities," that SSA was "making excellent progress with the assignment process," and that, as of the date of his testimony, SSA had completed about 40 percent of the assignments. *Id.* No plea was made for more time or more resources to complete this task.

In follow-up answers to questions posed by Representative Nancy Johnson, Mr. Thompson described the impact of the Coal Act duties on SSA's other tasks. He testified that SSA's Office of Central Records Operations was able to apply nearly 26,600 hours of overtime provided as reimbursement for Coal Act activities to its most critical and time sensitive workloads in order to hold down pending levels. Further, "OCRO is working of an aggressive plan to restrore pending levels to their pre-Coal Act levels within a reasonable time frame." *Id.* at 47.

The Ways and Means Subcommittee on Oversight conducted another hearing on June 22, 1995, less than two years after the previous hearing. Mr. Thompson, then the Principal Deputy Commissioner of Social Security, again described SSA's tasks. He advised the subcommittee, without qualification, that "SSA completed the process of making the initial assignment decisions by October 1, 1993, as required by law." *Coal Industry Retiree Health Benefit Act of 1992: Hearing Before the Subcomm. on Oversight of the House Ways and Means Comm.*, 104th Cong. 23 (1995).

No changes were made in the Coal Act following these hearings. In 1999, Congress allocated additional funds to maintain the Combined Fund's financial integrity. *See* Consolidated Appropriations Act, 2000, Appendix C, H.R. 3423, Pub. L. No. 106-113, 1999 U.S. Code Cong. and Ad. News (113 Stat. 1501A-135, A-214) and Signing Statement, William J. Clinton, 1999 U.S. Code Cong. and Ad. News 290, 300 (November 29, 1999) ($68 million in interest accrued by the AML Fund transferred to the Combined Fund as emergency requirement). This additional funding did not alter the Coal Act's existing financing structure.

In 2000, the Senate considered a proposal specifically designed to remove the October 1, 1993 cut-off date from the Coal Act. *See* Joint Committee on Taxation, *Description of the Chairman's Mark of the "Retired Coal Miners Health Benefit Security Act"* (JCX-90-00), Sep. 5, 2000. This proposal was rejected in favor of additional funding for the Combined Fund without amendment to the text of the statute.

In April 2002, the General Accounting Office reported to Congress on the status of the Combined Fund. According to this report, spending by the Combined Fund on healthcare for assigned beneficiaries in this closed and aging population simply outstripped the CPI-based increases allowed by the Coal Act. As a result of the per beneficiary premium being pegged to the CPI, the assigned operator accounts would have had deficits regardless of the number of beneficiaries. *Retired Coal Miners' Health Benefit Funds: Financial Challenges Continue*, GAO-02-243 (April 2002). Thus, Congress has had no reason to believe, and taken no action suggesting that the enforcement of the October 1, 1993 deadline is at odds with the Coal Act as written.

SUMMARY OF ARGUMENT

The plain language of a statute notifies affected parties of both their rights and obligations. Congress set a specific deadline for the government to make assignments, clearly preferring to get the Combined Fund fully functioning soon after the Act's passage. Congress did not expect that SSA would continue perfecting the assignment process in years hence. Nothing that Congress did when it passed the Act, or has done since then, implies or supports a conclusion that Congress expected SSA to return to the task years later to see if, perhaps, it could assign some number of previously unassignable beneficiaries.

For their part, so-called "assigned operators" reasonably relied on the statutory deadline to order their affairs, anticipating that the statutory scheme would produce no dramatic upward change in the number of beneficiaries they

would be assigned once the initial assignments were sorted out. The court below correctly concluded that this statutory deadline, mandating assignments to be made before October 1, 1993, means what it says. Accordingly, SSA acted improperly when it decided, at the urging of the Combined Fund, to engage in fresh rounds of assignments beginning in 1995.

The petitioners' representations of Congressional intent and their dire forecasts of the potential impact of the decision below are both inaccurate and misleading. There is no overriding public interest which will be thwarted by enforcing the October 1, 1993 deadline. Both the Trustees and the government seek to have this Court rewrite the statute to change the structure which Congress knowingly put into place and from which it has not deviated. Absent any direct support in the Coal Act or otherwise, the government essentially relies on its appellate counsel's version of the facts to ask the Court to ignore the specific cut-off date. The Court should deny this request. The decision below should therefore be affirmed.

ARGUMENT

The essence of the government's position, with the concurrence of the trustees of the Combined Fund, is that the statutory October 1, 1993 deadline is meaningless. The government seeks unfettered power to make assignments to parties like Elgin whenever it chooses. Even though the government tries to assure the Court that it would not abuse this unconstrained power, such assurances would do nothing to protect parties from the "continuing and brooding presence" of unlawful agency conduct. *Super Tire Eng'g Co. v. McCorkle*, 416 U.S. 115, 122 (1974). The Court is urged to reject the government's position and enforce the statutory deadline as Congress intended.

I. The language of the Coal Act is clear, unambiguous, and consistent with Congressional intent that assignments be made before October 1, 1993 or not at all.

The statute as a whole supports a conclusion that Congress fully intended the October 1, 1993 date as a deadline. Congress set up a comprehensive timeframe for creation and funding of the Combined Fund. It connected funding and premium calculations to the status of assignments as of October 1, 1993. 26 U.S.C. § 9704(f). Any beneficiaries not initially assigned by this deadline became "unassigned" beneficiaries whose number was an essential part of the calculation of the obligation of each assigned operator. *Id.* Absent a specific figure representing the number of unassigned beneficiaries, the statutory scheme as a whole would be undermined.

That Congress viewed the statute this way is evidenced by the proposed Conference Report associated with the Coal Act which includes the following statements:

> The first plan year is an eight-month period running from February 1, 1993 through October 1, 1993. ... In the first plan year the Secretary of HHS will review the work history of each beneficiary and will prepare the assigned operator allocations which are *required* to be made by October 1, 1993.

138 Cong. Rec. S17,605 (daily ed. Oct. 8, 1992) (emphasis added). The normal indicia of Congressional intent thus weigh in favor of enforcement of the October 1, 1993 deadline.

The court below rejected the contention that Congress did not intend October 1, 1993 to be a deadline because the Coal Act is unlike the statutes which attach no significance to the government's failure to act within a specified timeframe. The calculation of the premium amounts to be charged by the Combined Fund depended upon the completion of the assignment of beneficiaries by October 1, 1993. Congress did

not merely hope that the government would try to assign beneficiaries before October 1, 1993. Rather, Congress premised the calculation on the completion of this process before October 1, 1993. The October 1, 1993 cut-off date was intended to preclude the government from making new assignments indefinitely.

The trustees claim that Congress could not have meant the cut-off date to be more meaningful that the task of assigning as many beneficiaries as accurately as possible. They posit that, if the date is in fact a mandatory deadline, then the government could have simply complied by assigning all of the beneficiaries to a single operator before October 1, 1993 and then sorted it out later. This, of course, would have been an unconscionable abuse of discretion by the government that would have led to many other problems, the least of which being that it would have thoroughly undermined the Act's funding provisions. For example, if Elgin had been sent a bill for all of the Combined Fund beneficiaries, it simply could not have paid even a small portion of the total. The effect would have been comparable to the government having made no assignments before the cut-off date.

II. The government's unannounced return to the assignment task in 1995 was improper.

The government current explanation for why SSA began to consider making "new" assignments in 1995 seems to be that the assignment process had been ongoing in some sense, and, when the agency felt it had better information, it simply proceeded to send out new assignments. Based on what the government has represented previously in related litigation, however, it seems that this is not what was really going on. Rather, it seems that SSA re-started the assignment process in 1995 after prompting by the Combined Fund. Appendix 4a. This was despite the fact that, so far as Congress knew, the government had completed the initial assignments in 1993 and was working on other matters in 1995.

SSA's treatment of the assignment task raises serious questions about its compliance with basic tenets of administrative law. *See* Hendrickson, *An Examination of Administrative Issues Under the Coal Industry Retiree Health Benefit Act of 1992 in the Context of Judicial Review; Overton Park, Private Rights and Limits on Informal Agency Authority*, 22 Energy & Min. L. Inst., ch. 10 (2002). The government's actions, conducted behind the scenes, did not alert any potentially liable party that wholly new assignments were in the offing. It is entirely understandable that a potential "assigned operator" would conclude upon reading the statute that it need not plan for receiving additional Coal Act assignments once the initial assignments were sorted out. Even assuming that potentially affected parties were privy to the essentially non-public developments behind the government's implementation of the statute, they still had no reason to suspect that their reading of the statute was in error. Nothing in the government's representations to Congress suggested that the government intended to set no limit on the time for making assignments. This was improper conduct on the government's part and should not be sanctioned.

III. There is no overriding public interest which justifies ignoring the October 1, 1993 deadline.

The government and the trustees claim that assigning ever more previously unassigned beneficiaries is a positive result which will be thwarted if the October 1, 1993 deadline set forth in the Coal Act is enforced. This is simply another formulation of the argument that Congress could have done a better job of drafting the statute. The Court made it clear in *Sigmon* that improving a statute generally and the Coal Act in particular is not within the judicial purview. To the extent the Court believes it necessary to address the policy arguments raised by the petitioners notwithstanding the fact that these are merely appellate counsel creations, it should reject them as unfounded, inaccurate and misleading.

Congress recognized that, as a practical matter, not all beneficiaries can be assigned to a specific last signatory

operator or related person. For that reason, specific provision was made for "unassigned" beneficiaries. 138 Cong. Rec. S17,605 (daily ed. Oct. 8, 1992) (proposed conference report). These are not "orphans," as both the trustees and the government persist in calling them. This term came into usage in the days when the UMWA and the coal operators' association were at odds over collective bargaining. It suggests that such beneficiaries have been abandoned or left without coverage, which is untrue in the setting of the Coal Act. "Unassigned" beneficiaries are treated no differently than any other Combined Fund beneficiary. It is doubtful that they are even aware of their status since it is irrelevant to them.

Regardless of the statutory language and the representations made to Congress, the agency, through counsel, now claims that Congress could not have intended the government to stop making assignments. The agency thereby retreats from the representations made to Congress that it was required to complete the initial assignments by October 1, 1993. This change in position is entitled to no deference:

> Congress has delegated to the administrative official and not to appellate counsel the responsibility for elaborating and enforcing statutory commands. It is the administrative official and not appellate counsel who possesses the expertise that can enlighten and rationalize the search for the meaning and intent of Congress.

Investment Co. Institute v. Camp, 401 U.S. 617, 628 (1971), citing *Burlington Truck Lines v. United States*, 371 U.S. 156 (1962).

As a policy matter, there are ample reasons that Congress would not have intended SSA to undertake new assignments long after the passage of the Act. Underlying the government's claim to additional time to make assignments is the implication that more time meant more accurate decisions.

However, the government's experience in pursuit of "successor in interest to a signatory operator" liability, the subject of *Sigmon Coal Co., supra,* belies this claim. The government decision to pursue this basis for liability only led to more litigation, not a reduction in the number of unassigned beneficiaries.

Even assuming that more time correlates to better accuracy, if Congress had wanted an open-ended and as close to perfect as possible match between employers and retirees, it would have given the task to the Department of Labor. With its extensive data base of mine owners and history of parsing employment records, including, but not limited to SSA earnings records, Labor could have done a much more thorough job. This would, however, have likely taken much longer. *See* Lopatto, *The Federal Black Lung Program: A 1983 Primer*, 85 W.Va. L.Rev. 677, 689 (1983) (discussing Labor's experiences in administering the black lung program and, in particular, the difficulties associated with analyzing employment histories). Congress did not choose this option.

For another thing, giving SSA an open-ended task would have required SSA to devote unquantifiable resources to the assignment process. As indicated by Mr. Thompson's testimony, SSA needed, and intended, to redeploy its resources to its primary tasks after completing the assignment process. At the same time that SSA was undertaking its new duties under the Coal Act, the General Accounting Office was reporting that SSA was experiencing an increase in the number of disability claims it was processing. *Social Security: Increasing Number of Disability Claims and Deteriorating Service*, GAO/HRD-94-11 (1993). Congress was thus aware that SSA's mission would suffer adversely if its additional Coal Act tasks did not end.

Finally, there is a valuable trade-off associated with a perhaps less than perfect assignment process, namely certainty for assigned operators. Liabilities would be ascertainable in both the short and long terms, thereby freeing future transactions from the burden of unforeseeable events

involving "new" assignments coming from SSA at any point. This would bring stability to the financial expectations of the affected private parties, like Elgin, and closure to an unstable period in the coal industry.

The Sixth Circuit correctly rejected the government's claims that it was not bound by the October 1, 1993 date specified in the Coal Act.

CONCLUSION

For the reasons stated above, Elgin urges the Court to affirm the decisions below.

Respectfully submitted,

MARY LOU SMITH
(Counsel of Record)
Howe, Anderson & Steyer, P.C.
815 Connecticut Avenue, N.W.
Suite 620
Washington D.C. 20006
(202) 296-5680

Attorneys for *Amicus Curiae*
Elgin National Industries, Inc.

Dated: June 7, 2002

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
LONDON

Eastern District of Kentucky
FILED
FEB 14 2000
AT LEXINGTON
LESLIE G. WHITMER
CLERK, U.S. DISTRICT COURT

CIVIL ACTION NO. 99-532

MANALAPAN MINING COMPANY, INC. PLAINTIFF

v. DEFENDANT'S MEMORANDUM IN RESPONSE TO PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT PURSUANT TO RULES 56 AND 54(b)

KENNETH APFEL, COMMISSIONER DEFENDANT

*** *** *** *** *** *** ***

INTRODUCTION

The defendant, the Commissioner of Social Security (Commissioner) agrees that the Sixth Circuit's decision in *Dixie Fuel v. Commissioner of Social Security, et al.*, 171 F.3d 1052 (6th Cir. 1999) controls the issue of whether the Social Security Administration (SSA) can make first assignments of miners to coal operators on or after October 1, 1993. In *Dixie Fuel*, the Sixth Circuit determined that SSA could not assign miners on or after October 1, 1993.

While the defendant understands that this Court is bound by the Sixth Circuit's decision, for the following reasons the defendant disagrees with the Sixth Circuit. Furthermore, the Commissioner requests that any determination by the court on this matter not be final and appealable until this entire case is decided.

DISCUSSION

The Sixth Circuit erred in *Dixie Fuel* in finding that the Act read as a whole was unambiguous that no miner could be first assigned on or after October 1, 1993. The Act itself does not contain any express language to that effect.

In finding the Act to be unambiguous the court went against the normal rule of statutory construction, that the agency maintains authority to act absent an express limitation to the contrary. See, e.g., United States v. James Daniel Good Real Property, 510 U.S. 43 (1993); General Motors Corp. v. United States, 496 U.S. 530 (1990); United States v. Motalvo-Murillo, 495 U.S. 711 (1990); Brock v. Pierce County, 476 U.S. 253 (1986); Friends of the Crystal River v. U.S. Environmental Protection Agency, 35 F.3d 1073 (6th Cir. 1994); St. Regis Mohawk Tribe, New York v. Brock, 769 F.2d 37 (2d Cir. 1985), cert. den., 476 U.S. 1140 (1986). If the statute that prescribes the time limit also specifies a particular consequence for a failure by SSA to meet that time limit, courts will enforce the consequence that Congress has prescribed in the statute. However, if the statute that prescribes the time limit does not specify a consequence for failure to meet the time limit, the time limit is considered merely directory in nature, i.e., as a goal SSA should strive to meet, but which has no legal effect. In this latter situation, agency actions taken after the time limit has passed are no less valid than if taken by the specified time. See, e.g., James Daniel Good Real Property, supra; Montalvo-Murillo, supra; Brock v. Pierce County, supra.

This rule applies even where the statutory time limit is phrased in seemingly mandatory terms, using the word "shall." Montalvo-Murillo, 495 U.S. at 718; Brock v. Pierce County, 476 U.S. at 260.

Further, the court went against the natural meaning given in common usage. In common usage, when an instruction is given to complete a task within a given time period, it is

typically understood that if the task is not completed within that time that the task should still be completed.

While it is true that the Act makes provisions for miners who were not assigned by October 1, 1993 since Congress might make such provision whether or not it intended that all first assignments should stop on October 1, 1993, this language cannot render the Act unambiguous.

Had the court not found the Act to be unambiguous, it would have faced the legislative history and the deference that should have been accorded the agency's interpretation.

The legislative history shows that the Congressional purpose in the time limit was to insure that the Combined Fund would be solvent and functioning as soon as possible. With respect to a miner who was not assigned prior to October 1, 1993 but subsequent information develops that such miner can be assigned to a functioning entity, the solvency of the fund would be enhanced, not retarded by such assignment.

Furthermore, where the agency is charged with carrying out the provisions of a statute, if the agency interpretation is reasonable, it is entitled to deference and will be followed even if the courts would have adopted another interpretation.

By the October 1, 1993 date, SSA had reviewed 68,056 miner wage records and 48,787 miners were assigned to signatory operators. Outside of SSA's review, 16,281 miners were voluntarily accepted by 15 signatory operators. The initial assignments made after September 30, 1993, which would be subject to the *Dixie* court decision, were made relevant to three different occurrences:

- Approximately 20,000 of the unassigned miners were placed in the unassigned pool and an unknown number were held pending further development of their employment records which went back to 1946. After obtaining microfilm records and further development, assignment letters on an additional

2,264 beneficiaries went out between October 2, 1993 and March 31, 1994.

- In 1995, the Combined Fund requested SSA to review the 20,000 miners in the unassigned pool. SSA was able to assign 5,301 of these miners on September 16, 1996, because of the additional employer information developed from the mining companies in the course of administrative obtained from State agencies.

- In 1997, the Combined Fund submitted a list of some 500 retired miners who were not submitted with the first list in 1993. SSA was able to assign 278 to signatory operators or related parties on September 22, 1997.

SSA regarded the October 1, 1993 deadline as an expression of Congress' intent to spur SSA to prompt action, in light of the perception that the health benefit funds were nearly broke. 138 Cong. Rec. S17603 (October 8, 1992). In reviewing the records readily available, some of the miners were left unassigned. While Coal Act legislative history is replete with references to the "unassigned pool," there is no provision in the Coal Act as to the beneficiaries in the unassigned pool. In keeping with the stated intent of Congress, SSA continued to procure information to assure that the largest possible number of beneficiaries be assigned. The Conference Committee Report expressly states: "The conferees intend that the largest possible number of beneficiaries in the Plans be assigned to a specific or designated company." 138 Cong. Rec. S17566-01, S17605.

Dixie Fuel argued that in enacting the Coal Act, Congress and the Commissioner contemplated a one-time only assignment event and that the only assignments after October 1, 1993 should be reassignments as the result of

administrative appeals.[1] SSA's position that Congress' intended the October 1, 1993 deadline to be a spur to agency action and not a bar to assignments after that date is bolstered by the fact that Congress did not appropriate funding to carry out SSA's responsibility under the statute until July 2, 1993. SSA was not authorized to use Trust funds for implementation of the Coal Act; therefore, resources were not available for implementation of the assignment provisions of the Act until three months before the statutory time limit to complete assignments. This obviously was not the intent of Congress and does not serve the purpose for which the Coal Act was framed.

2. Interlocutory Appeal

As stated above, while the Commissioner disagrees with the Sixth Circuit's decision in *Dixie Fuel*, it is clear that this Court is bound by this decision and must enter an order to this effect. However, we request that this order not be immediately appealable for the following reason. The "*Dixie*" matter is not the only issue in this case. Plaintiff also contends that all its assignments of miners are improper because of other reasons. If, in fact, this court agrees with plaintiff on these other issues, all "Dixie-like" assignments, a sub-group of all of Manalapan's assignments, would be covered by such a decision. Therefore, in the interest of judicial economy, it would make sense that any appeal[2] in this case be made only after all the issues are decided.[3]

---

[1] Although the circuit court did not discuss that theory, it held that SSA had no authority to make initial assignments of retired miners after September 30, 1993.

[2] And decision to appeal.

[3] The Court could also present one final determination in this case which covers both issues.

CONCLUSION

For the foregoing reasons, the Commissioner agrees that the decision in *Dixie Fuel* is the law in the Sixth Circuit, although he respectfully disagrees with this decision. Furthermore, the Commissioner requests that any decision of this Court on this matter should not be immediately appealable.

Respectfully Submitted,

JOSEPH L. FAMULARO
UNITED STATES ATTORNEY

/s/_____
By: David E. Middleton
Assistant U.S. Attorney
110 W. Vine Street Suite 400
Lexington, KY 40509-1671
(606) 233-2661

OF COUNSEL:

ARTHUR J. FRIED
General Counsel for Social Security Administration

CHARLOTTE HARDNETT
Principal Deputy General Counsel

JOHN M. SACCHETTI
Associate General Counsel, Litigation Division

ETZION BRAND
Branch Chief, Retirement, Survivors
and Supplement Assistance Litigation Branch

KAREN J. AVILES
Attorney
Office of the General Counsel
Social Security Administration
Room 617 Altmeyer Building
6401 Security Boulevard
Baltimore, Maryland 21235
TELEPHONE: (410) 965-3457

CERTIFICATE OF SERVICE

I certify that a copy of this document was served by regular U.S. Mail to:

Susan C. Lawson
LAWSON & LAWSON P.S.C.
Wheeler Building, Suite 301
103 North First Street
P.O. Box 837
Harlan KY 40831

H. Kent Hendrickson
RICE & HENDRICKSON
P.O. Box 980
Harlan KY 40831

On 14 February 2000.

/s/ _____
David E. Middleton
Assistant U.S. Attorney